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In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF WYOMING AND THE OHIO OIL COMPANY

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

This reply brief is submitted primarily in response to defendants' contentions not anticipated in the plaintiff's brief. (See points 1 and 2 below.) This brief also undertakes to supplement our discussion of defendants' argument that the Wyoming Enabling Act in itself operated to reserve school lands (Pl. Br. 37–39; see point 3 below). The defendants' contentions to which this brief is addressed are as follows:

1. That the Wyoming Enabling Act represents a departure from the federal policy relating to school grants as expressed in *Heydenfeldt* v. *Daney Gold, etc. Co.*, 93 U. S. 634 (Def. Br. 42–45; 58–65).

2. That the doctrine of the railroad grant cases should be extended to the school grant contained

in the Wyoming Enabling Act (Def. Br. 33–37; 75–85).

3. That the phrase "but shall be reserved for school purposes only," employed in section 5 of the Wyoming Enabling Act, in itself operated as a "reservation" by the United States of all unsurveyed school lands in Wyoming so as to prevent their inclusion in federal reserves (Def. Br. 29–43). As a corollary the defendants argue that the Wyoming Enabling Act was not affected by the amendment of February 28, 1891, c. 384, 26 Stat. 796, generally liberalizing lieu land provisions (Def. Br. 71–73).

I

THERE HAS BEEN NO SHIFT IN THE FEDERAL POLICY RESPECTING SCHOOL GRANTS

The defendants assert that Congress chose the language in section 5 of the Wyoming Enabling Act for the deliberate purpose of effecting a change in the federal policy defined in the case of *Heydenfeldt* v. *Daney Gold, Etc. Co.*, 93 U. S. 634 (Def. Br. 42–45; 58–65).[1] Defendants' argument closely patterns the opinion in *State* v.

[1] In this connection defendants place considerable emphasis on the legislative history of section 14 of the Wyoming Organic Act of 1868, relating to school sections, as indicating a congressional intent not to subject unsurveyed school lands to preemption or entry (Def. Br. 58–61) and as establishing a departure from the policy of the Act of February 26, 1859, 11 Stat. 385, authorizing in all public-land States and Territories the selection of lieu lands for unsurveyed school sec-

Whitney, 66 Wash. 473, 483. But after this Court's decision in *United States* v. *Morrison*, 240 U. S. 192, the Supreme Court of Washington, recognizing its error, at the first opportunity explicitly overruled its decision in the *Whitney* case and held that title to unsurveyed sections 16 and 36 did not pass to Washington under provisions substantially identical with sections 4 and 5 of the Wyoming Enabling Act. *Thompson* v. *Savidge*, 110 Wash. 486, 505–506.[2] After Wy-

tions settled under the public land laws (Def. Br. 20). Defendants seem to think this legislative history placed the Wyoming Organic Act in a class separate from the organic acts of other Territories (Def. Br. 61). Congress thought otherwise. Section 14 was reenacted as a part of R. S. 1846 covering the Territory of Wyoming and seven other Territories. At the same time the 1859 Act was reenacted as R. S. 2275. The revised statutes, not the original enactments, control in the absence of ambiguity. *United States* v. *Bowen*, 100 U. S. 508, 513; *Continental Casualty Co.* v. *United States*, 314 U. S. 527, 530. Moreover, R. S. 2275 (1859 Act) was amended in 1891 for the precise purpose of providing for the uniform benefit and operation of school grants among the public land States and Territories. Act of February 28, 1891, c. 384, 26 Stat. 796, 43 U. S. C. 851 (See S. Rept. No. 502, 51st Cong., 1st Sess., p. 1 (1890); H. Rept. No. 2384, 51st Cong., 1st sess., p. 1 (1890)).

[2] This was the consistent position of the Department of the Interior with respect to the Washington Enabling Act, both before and after the *Thompson* case. *State of Washington* v. *Kuhn*, 24 L. D. 12, 13 (1897) cited with approval in *United States* v. *Morrison*, 240 U. S. 192, 207; *State of Washington* v. *Geisler*, 41 L. D. 621, 622–625 (1913); *State of Washington* v. *Lynam*, 45 L. D. 593, 594 (1916); *F. A. Hyde and Company*, 48 L. D. 132, 133–134; 48 L. D. 134 (1921). The defendants' statement of the holding in the *Hyde* case, *supra* (Def. Br. 46), is the opposite of what was there held.

oming, four states were admitted into the Union. If the defendants are correct about a change of federal policy it might be expected that the language of the enabling acts of those four states uniformly would follow the pattern of section 5 of the Wyoming Enabling Act. Two of them did (Oklahoma, secs. 7, 9, 34 Stat. 267, 272, 274; Utah, Secs. 6, 10, 28 Stat. 107, 109, 110). However, the enabling acts of the other two, the last admitted into the Union, contain no provision such as defendants point to in section 5 of the Wyoming Enabling Act (New Mexico, sec. 6, 36 Stat. 557, 561; Arizona, Sec. 24, 36 Stat. 557, 572). Those two employ language akin to the enabling acts of Nevada and Oregon, considered by this Court in *Heydenfeldt* v. *Daney Gold, etc. Co.,* 93 U. S. 634, and *United States* v. *Morrison,* 240 U. S. 192, respectively. Would defendants contend that the United States again shifted its policy in the cases of New Mexico and Arizona?

What the defendants' argument amounts to is that Wyoming is an exception to the general policy relating to unsurveyed school lands. The defendants offer no special reason or circumstance as to why the Wyoming grant should be construed to give Wyoming a preferred position over its sister states with respect to school lands. The plaintiff is aware of none. And none was presented to or considered by Congress when it had before it the legislation under which Wyo-

ming was admitted. On the contrary, the legislative history of the 1890 Enabling Act shows Wyoming was being given "the usual land grants." H. Rept. No. 39, 51st Cong., 1st sess. p. 26, (1890). As the manager of the bill on the floor of the House put it, "I wish to say to all of these gentlemen and to this House that the bill is exactly, in its land provisions, like all the bills, in respect of those things providing for the admission of the other States, that have been passed by Congress heretofore." 21 Cong. Rec. 2707 (1890).

II

THE DOCTRINE OF THE RAILROAD GRANT CASES IS INAPPLICABLE TO SCHOOL GRANTS.

The defendants seek to invoke the doctrine of the railroad cases (Def. Br. 33–37; 75–85). Clearly there is no occasion to look to the railroad grant cases when this Court repeatedly has declared the law with respect to school grants substantially similar to Wyoming's. It is significant that, although here we are concerned with a school grant, defendants do not rely on the school grant cases but on the railroad grant cases.

The railroad grant cases are inapplicable since the decisions represent constructions of grants clearly distinguishable in purpose and language from the school grants and aimed at effectuating federal policies foreign to school grants. Between 1850 and 1871 Congress subsidized rail-

road construction by lavish grants of public land in order to develop a transportation system and to hasten settlement of the land. After 1871 outright grants seem to have been discontinued. *Krug* v. *S. F. P. R. R. Co.*, Nos. 97, 98, October Term, 1946, decided February 3, 1947, slip op. p. 1; *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 273, 274. As a practical matter it was necessary, under the grants which were made, that the railroads' rights to land in the "place", as distinguished from the indemnity, limits of the grants (e.g. *United States* v. *Northern Pacific Ry. Co.*, 311 U. S. 317, 328) should vest as construction progressed, since the granted lands represented the foundation for financing the construction. But in the case of school grants no such consideration applied.

The purpose of the school grant was to provide for a fund for the support of the schools. Cf. *Ross* v. *Trustees of University of Wyoming*, 31 Wyo. 464, 477. Fulfillment of that purpose did not require that the State receive specific lands. It was unimportant to the State whether it received particular land so long as it received the quantity of land and there was no need to sacrifice the Government's right to withdraw land for public purposes. *Heydenfeldt* v. *Daney Gold, etc. Co.*, 93 U. S. 634, 639–640; *United States* v. *Morrison*, 240 U. S. 192, 200.

In this connection defendants make reference to protraction as a substitute for surveys (Def. Br. 82). It may be that in dealing with railroad grants Congress in some instances has authorized protraction, but not for the purpose of passing title. And in the case of school grants Congress authorized protraction of lands included within public reservations, not for the purpose of passing title, but to ascertain "the number of townships" in order that the State might "select indemnity lands" in lieu of sections 16 and 36. Act of February 28, 1891. (Pl. Br., Appendix p. 73.) But nowhere is there authority for the proposition that a claimant may establish a right to an unsurveyed section by substituting protracted lines for a survey of the section lines.[3]

[3] For example see the lines of section 36 drawn by defendants on the diagram following page 12 of their brief. In the legend of that diagram the defendants refer to "Lines protracted by Coleman in 1892," meaning the lines subdividing into quarters, sections in townships other than the township 58–100 in controversy. The exterior lines of those sections previously had been run, measured and marked. Those "Lines protracted by Coleman" were drawn between the quarter section corners established by official survey on the exterior lines of the section. Defendants' protraction of section 36 extends into the unknown. If section 36 can be established by protraction, why not all other sections? It seems rather late in the history of our public lands administration to tamper with the laws and rules governing the survey of public lands.

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III

THE PHRASE "BUT SHALL BE RESERVED FOR SCHOOL PURPOSES ONLY" DID NOT PREVENT THE UNITED STATES FROM WITHDRAWING UNSURVEYED SCHOOL LANDS FOR PUBLIC PURPOSES

1. The phrase appears in section 5 of the Wyoming Enabling Act (Pl. Br., Appendix 68). Section 5 does not contain words of grant—those words are found in section 4. Section 5 deals with "granted" lands. Its prime purpose is to impose limitations on the State in the sale and lease of lands "granted for educational purposes" and the use of the income derived from such sale or lease. Section 5 also provides that "such land," that is, land "granted for educational purposes,"

> shall not be subject to pre-emption, homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

Defendants argue, in effect, that when the words "but shall be reserved for school purposes only" are read with the language of grant in the preceding section 4, they operate as a dedication by the United States of all unsurveyed school sections in Wyoming (Def. Br. 29–43). A similar argument was made and rejected in *Minnesota* v. *Hitchcock,* 185 U. S. 373, 395, and in *United States* v. *Morrison,* 240 U. S. 192, 205–209. To adopt defendants' argument would require a

reversal of policy with respect to practically all school grants, since many of them contain identical language and the rest contain language of a similar purport. It would raise havoc with settled titles.

The phrase should not be lifted from the sentence and section in which it appears and used out of context with what immediately precedes it to create what is charged to be a conflict with language in another section of the act. It must be read in context, having in mind the purposes and scope not only of the section but of the entire act. *Heydenfeldt* v. *Daney Gold, etc. Co.*, 93 U. S. 634, 638. So read, the words "but shall be reserved for school purposes only" mean at most that "such land," that is, land "granted" by section 4 for educational purposes, was not open for settlement under the federal land laws. So construed the phrase takes on meaning in the section in which it appears appropriate to its modest setting in the act.

Even this meaning would be effectual only during the seven-month period between the dates of the Enabling Act of 1890 and the Act of February 28, 1891, c. 384, 26 Stat. 796, since the latter act removed the prohibition against preemption and entry contained in section 5 of the 1890 Enabling Act. The provisions of the 1891 Act have been consistenly construed to subject

unsurveyed school lands, in states having grants identical to Wyoming's, to preemption and entry under the public land laws as well as to withdrawal for public purposes. *Black Hills National Forest,* 37 L. D. 469, 471–472 (1909) (South Dakota); *State of Montana,* 38 L. D. 247, 249–250 (1909). Cf. *Joseph B. Lessman* (Idaho), 44 L. D. 347 (1915); see Lands Decisions cited in *United States* v. *Morrison,* 240 U. S. 192, at page 207. This construction has become a rule of property. And even if there were cause, the Court "should be slow to disturb a ruling of the department of the Government to which is committed the administration of public lands." *California v. Deseret Water, etc. Co.,* 243 U. S. 415, 421. (See also Pl. Br. pp. 38–39 concerning reenactment of identical language in 1934 with knowledge by Congress of prior administrative construction.)

2. The defendants argue that the Act of February 28, 1891 (Pl. Br., Appendix p. 72) cannot operate as an amendment of the enabling act on the theory that a compact between sovereigns cannot be modified without consent (Def. Br. 71–73).[4] Wyoming accepted the 1891 Act as an

[4] The phrase "otherwise disposed of" in section 4 of the Wyoming Enabling Act, standing alone, is sufficient to authorize the withdrawal of unsurveyed school lands for federal reserves. *Wisconsin* v. *Lane,* 245 U. S. 427, 434; *United States* v. *Stearns Lumber Co.,* 245 U. S. 436, 438–439; *United*

amendment to its enabling act when the State took the benefits of the 1891 Act.

Thus, Wyoming did not complain that its enabling act could not be amended by the 1891 Act when it sought lieu land for school sections 16 and 36 included in Yellowstone National Park. Under section 2 of the enabling act Wyoming was not entitled to lieu lands for school sections embraced in the Park. But in 1897 Wyoming sought and received indemnity on its own claim that the 1891 Act amended the 1890 Enabling Act and therefore the State was entitled to lieu land. *State of Wyoming*, 27 L. D. 35, 38 (1898). That accords with the consistent administrative construction of the effect of the 1891 Act. *State of Washington* v. *Kuhn*, 24 L. D. 12, 13 (1897); *State of South Dakota* v. *Thomas*, 35 L. D. 171, 172–173 (1906); *Black Hills National Forest*, 37 L. D. 469, 472–473 (1909); *State of Montana*, 38 L. D. 247, 249–251 (1909); *State of Washington* v. *Geisler*, 41 L. D. 621, 622–625 (1913).

States v. *Morrison*, 240 U. S. 192, 205; *Minnesota* v. *Hitchcock*, 185 U. S. 373. The 1891 Act was intended to effectuate the purpose of Congress that the school grants "have equal operation and equal benefit in all the public land States and Territories." S. Rept. No. 502, 51st Cong., 1st sess., p. 1 (1890); H. Rept. No. 2384, 51st Cong., 1st sess., p. 1 (1890). See discussion in *State of California*, 23 L. D. 423, 424–426 (1896). As an incident to its main purpose of liberalizing, and making uniform, lieu land provisions, the 1891 Act spelled out the pre-existing right of the United States to withdraw unsurveyed school lands for public purposes.

Again, Wyoming made no complaint concerning the inapplicability of the 1891 Act when it invoked and received the benefits of that portion of the Act permitting the State to select land in lieu of a surveyed school section owned by the State but embraced within the limits of a national forest. *Wyoming* v. *United States,* 255 U. S. 489, 493, 494. Certainly the State cannot demand that the 1891 Act be applied for the purpose of reaping a benefit, and subsequently in this litigation insist that the State had not consented to modification of its enabling act. Cf. *Thompson* v. *Savidge,* 110 Wash. 486, 494–495, 499.

CONCLUSION

It is submitted that the United States is entitled to judgment as requested in its opening brief at page 65.

Respectfully,

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3. Under the decisions of this Court, Sections 4 and 5 of Wyoming's Enabling Act, constituted a congressional reservation of all unsurveyed Sections 16 and 36, on behalf of Wyoming, for school purposes and by said reservation the then unsurveyed Section 36 herein involved was set apart and appropriated to Wyoming for said designated use or purpose and therefore said land did not thereafter constitute or form any part of the "public lands" of the United States which were subject to disposition by the officers or agents of the United States under the land laws of the United States 30

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Journals & Debates of Constitutional Convention of Wyoming, pp. 753-758 ..... 23, 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 10, Original.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF WYOMING AND THE OHIO OIL COMPANY,

Defendants.

BRIEF OF DEFENDANTS, STATE OF WYOMING AND THE OHIO OIL COMPANY.

JURISDICTION.

This is an original suit brought by the United States against the State of Wyoming and its lessee, The Ohio Oil Company, in which leave to file a Bill of Complaint was granted on October 9, 1944 (323 U. S. 699). Jurisdiction exists under Section 2 of Article III of the Constitution of the United States, and Section 233 of the Judicial Code (28 U. S. C. A. 341); *United States* v. *Texas*, 143 U. S. 621.

STATEMENT OF THE CASE.

(1) *Pleadings and Factual Background.*

A summary of the pleadings is contained on pages 3-12 of The Master's Report. (R. 433-440.) In its Bill of Complaint, the United States seeks to quiet its asserted title to Section 36, Township 58 North of Range 100 West of the Sixth Principal Meridian, Park County, Wyoming, and for an accounting by Defendants, in regard to the oil and gas produced by the Defendant, The Ohio Oil Company, in its operation of said land for oil and gas purposes, as the lessee of Wyoming.

Section 14 of the Wyoming Territorial Organic Act (July 25, 1868), as introduced, read:

> "And Be It Further Enacted, That when the lands in the said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, Sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be erected out of the same."

By an amendment, the words "That when the lands in said territory shall be surveyed under the direction of the Government of the United States, preparatory to bringing the same into market" were stricken so that Section 14 of Wyoming's Organic Act as it was adopted by Congress read:

> "That Sections numbered sixteen and thirty-six in each township in said territory shall be and the same are hereby reserved for the purpose of being applied to public schools in the state or states hereafter to be erected out of the same."

Sections 4 and 5 of Wyoming's Enabling Act (July 10, 1890) provide in part:

> "That Sections numbered 16 and 36 in every township of said proposed state, * * * are hereby granted to said state for the support of common schools * * * and such land shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

On March 7, 1892, Wyoming requested that surveys be made of certain townships, including the fractional Township 58 in question, for the purpose of identifying its "place" school land sections and as a basis for the selection of its "quantity school lands". (R. 188.) On March 8, 1892, a contract was entered into between the United States and Augustus L. Coleman whereby he was required to "well, truly, and faithfully survey, mark, and establish * * * the exterior and subdivisional lines of townships 57 north, ranges 97, 98, 99, 100, 101 and 102 west, and of fractional townships 58 north, ranges 97, 98, 99, 100, 101 and 102 west of the 6th Principal Meridian, Wyoming, and that he will complete these surveys, in the manner aforesaid, * * *" and in which he was informed of the aforesaid purpose and reason for said surveys. (R. 188B-191.) On August 5, 1892, the Commissioner of the General Land Office was advised that Coleman had completed the surveys covered by his contract and that the same were ready for examination in the field. On August 11, 1892, the United States Surveyor General for the State of Wyoming was directed to make a personal inspection of said surveys in the field. Pursuant to said instructions, the Surveyor General made such inspection and prepared field notes therefrom. On November 26, 1892, the plats, transcripts and field notes made by Coleman in connection with his survey

and the transcripts and notes made by the Surveyor General in connection with his examination in the field of the Coleman Surveys, were filed in the Office of the Commissioner of the General Land Office and submitted to him for his acceptance or approval, and on December 20, 1892, the Commissioner of the General Land Office, being fully advised and acting within his authority, accepted and approved said surveys. (R. 195-235.) R. 457-458, Master's Findings 4 to 8, inclusive.

The accepted Coleman field notes and plats in regard to said Township 58 North, Range 100 West, showed the establishment of the exterior boundaries of said Township and also the setting of the corner and quarter corner monuments on said exterior boundaries. As to said Section 36 of said Township 58, said accepted field notes and plats showed the establishment of the Southeast corner thereof, the quarter section point to the North and the Northeast corner thereof, and that Westerly from the Southeast corner there was established a quarter corner and the Southwest corner; that said field notes and plats also show that Coleman did not make a subdivisional survey of said Township 58, and that his said field notes and plats did not establish the interior lines of said Township. (R. 443 and Finding No. 9, R. 459.)

A subdivisional survey of Township 58 was authorized on July 14, 1914, and was accepted by the Commissioner of the General Land Office on July 27, 1916.

On December 6, 1915, about seven months before the acceptance of said subdivisional survey of said Township 58, the President included all of said Section 36, Township 58, in the withdrawal order which created Petroleum Reserve No. 41.

(2) *Analysis of Issues Submitted to the Master.*

Under the pleadings when the case came on for hearing before The Master, the asserted title by the United States to the Section 36 involved herein was founded upon three primary propositions, *i. e.*:

(1) That Wyoming did not under the school land grant provisions of its Enabling Act, acquire any vested, legal or equitable right to or interest in said land;

(2) That Wyoming did not, under the school land grant provisions of its Enabling Act, plus the accepted Coleman Survey (which on December 20, 1892, established the exterior boundaries of Township 58) acquire any vested, legal or equitable right to or interest in said land;

(3) That in any event, if propositions (1) and (2) are not valid, then the asserted title of the United States to Section 36 is good because the land was "known mineral land" on and prior to July 10, 1890, and on and prior to December 20, 1892, and that "known mineral lands" were excepted from Wyoming's School Land Grant.

At the hearing, the United States refused to offer any evidence in support of its tendered issue as to the "known mineral character" of the land and "for the record" stated to The Master that it was "willing to submit the title issue" upon its basic contention that Wyoming, prior to the accepted subdivisional survey of Township 58 (July 27, 1916), had acquired no legal or equitable right, title or interest to or in Section 36, and that therefore the land was subject to and was withdrawn by Petroleum Withdrawal Order No. 41, and that this constituted a disposition of the land prior to the vesting in Wyoming of any legal or equitable right, title or interest to or in said land.

As the case was submitted to The Master, the claim of Plaintiff to Section 36 rested solely upon the narrow and

technical contention that a complete and perfect legal title to Section 36 had not vested in Wyoming prior to Withdrawal Order No. 41, because prior to said withdrawal order there had been no accepted United States Subdivisional Survey of Township 58, whereby the lines of Section 36 were created and established and that until such complete and perfect legal title vested in Wyoming as the result of such an accepted subdivisional survey of Township 58, the United States had unlimited power and authority to make such a disposition of Section 36 as would prevent Wyoming from ultimately acquiring legal title thereto.

The Master accepted as the controlling factor a fictional issue as to the vesting of legal title instead of the actual issue which concerned the vesting, in Wyoming, of an equitable right, title and interest.

It is the contention of Wyoming that an equitable right, title to or interest in Section 36 vested in it long prior to the Withdrawal Order of December 6, 1915. This contention is based upon:

(a) The school land grant provisions of its Enabling Act;

(b) The school land grant provisions of its Enabling Act, plus the acceptance of the United States Survey in 1892 of the exterior boundaries of Township 58, which established the existence and location of the Section 36 in question within said Township 58.

(3) *Defendants' Objections to The Master's Findings of Fact and Conclusions of Law.*

We have no objection to the discussion, as far as it goes, by The Master, on pages 8 to 20 of his Report, of the Act of February 26, 1859, and Section 14 of the Wyoming Territorial Organic Act with its legislative history,

and the pertinent provisions of the school land grant of Wyoming's Enabling Act.

Nor do we have any objection to The Master's Findings of Fact concerning the accepted United States Survey in 1892 of the exterior boundaries of Township 58, and the establishment thereby of the exterior boundaries of Township 58 and Section 36, including the exterior corners and quarter corners of said section.

Objection is made to The Master's Third Finding of Fact which is a general finding in favor of Plaintiff as to ownership of Section 36.

Objection is also made to The Master's Ninth Finding of Fact insofar as it finds that the accepted survey of the exterior boundaries of Township 58 in 1892 did not, in equity, identify or make susceptible of identification, Section 36.

Objection is also made to The Master's Finding of Fact Number 12, on the ground that Section 36 was not subject to withdrawal on December 6, 1915, because of Wyoming's then existing equitable right, title or interest therein.

Defendants' objections, numbered 4 to 10 inclusive to The Master's Findings of Fact, concern the alleged error of The Master in failing and refusing to make designated Findings of Fact.

Objections 4 to 6 inclusive are intended to preserve and present the contention that Wyoming acquired a vested equitable right, title or interest to Section 36, predicated alone upon the said provisions of the school land grant of its Enabling Act.

Objections 7 to 10 inclusive to The Master's Findings of Fact, are intended to preserve and present Wyoming's contention that it acquired a vested equitable right, title

or interest in Section 36 by reason of the provisions of the school land grant of its Enabling Act, plus the accepted United States Survey in 1892 of the exterior boundaries of Township 58, which established the existence in and location of the Section 36 in question within said Township 58.

Objection 11 is directed to the Master's failure to find specially that a United States Survey of the exterior boundaries of Township 58 was accepted by the Commissioner of the General Land Office on December 20, 1892. This fact, which is of course established by the evidence, has not been in dispute since Plaintiff filed its Petition for Leave to file its Complaint, wherein it is stated:

> "While Section 36 was not surveyed until 1916, the township in which it lies was surveyed prior to that date. The north line of the township is a part of the Montana-Wyoming state line surveyed in 1880. The east, south, and west boundaries of the township were run in 1892 and the survey was accepted by the Commissioner of the General Land Office on December 20, 1892.
>
> "The State, it is believed, may contend that title to Section 36 passed to it upon acceptance of the 1892 survey of the township and therefore section 36 was not 'public land' available for withdrawal by the President under authority of the Act of June 25, 1910. * * *" (Page 3, of the Motion for Leave to File Complaint and Complaint, R. 2.)

Objections 12 and 13 concern the refusal of The Master to find that Section 36 was not known mineral land on or prior to July 10, 1890, (the date of Wyoming's Enabling Act) or in any event, was not known mineral land on or prior to December 20, 1892, (the date of acceptance of the survey of the exterior boundaries of Township 58).

Objection 14 to The Master's Findings of Fact, concerns the refusal of The Master to find that Wyoming has been

the owner of a vested equitable right, title and interest in Section 36, since July 10, 1890, or in any event, has been the owner of such vested equitable right, title or interest since December 20, 1892.

Objection No. 15 to The Master's Findings of Fact, concerns the refusal of The Master to find that Wyoming is now and at all times since July 27, 1916, (the date of the acceptance of the subdivisional survey of Township 58) has been the owner in fee simple of section 36 with relation back.

Objections to The Master's Conclusions of Law, correlated to the objections to The Master's Findings of Fact, have been filed.

Upon the issue as to the ownership of Section 36, The Master made but one conclusion, which was a general one, in favor of Plaintiff, and to which Defendants have objected.

The objections Numbered 1 to 5 inclusive to The Master's Conclusions of Law, are directed to the alleged error of The Master in refusing to conclude that Wyoming, under the provisions of the school land grant of its Enabling Act, acquired such an equitable right, title or interest in Section 36 as was sufficient in equity to bar the United States from thereafter making any disposition of said land, which would prevent Wyoming's vested equitable right, title or interest from ripening into a legal title upon an approved subdivisional survey of Township 58.

The objections Numbered 6 to 8 inclusive to The Master's Conclusions of Law, are directed to the alleged error of The Master in refusing to conclude that the said provisions of the school land grant and reservation of Wyoming's Enabling Act, plus the accepted 1892 survey of the exterior boundaries of Township 58, and the consequent location and identification of Section 36, vested in

Wyoming upon the date of the acceptance of such survey such a vested equitable right, title and interest in Section 36 as would thereafter, in equity, bar the United States from making any disposition of Section 36 which would prevent Wyoming's vested equitable right, title and interest from ultimately ripening into a legal title upon the acceptance of a subdivisional survey of Township 58.

Objection Number 9 to The Master's Conclusions of Law is directed to the alleged error of The Master in refusing to conclude that Section 36 was not "known mineral land" on or prior to December 20, 1892.

Objection Number 10 to The Master's Conclusions of Law, is directed to the refusal of The Master to conclude that Plaintiff was estopped from asserting ownership of Section 36 against the Soverign State of Wyoming.

Objections Numbered 11 and 12 to The Master's Conclusions of Law, are directed to the refusal of The Master to conclude that Wyoming's equitable right, title or interest in Section 36 ripened into a legal title thereto upon the acceptance by the Commissioner of the General Land Office on July 27, 1916, of a subdivisional survey of Township 58.

OBJECTIONS TO BE URGED.

All objections to The Master's report will be urged under what are deemed to be convenient and appropriate heads and subheads with an indication of the objection or objections involved therein.

CHRONOLOGY.

July 25, 1868—Wyoming Organic Act.
(Sections 16 and 36 "reserved for the purpose of being applied to public schools.")
Legislative history shows change in policy supporting wording.

March 1, 1877—Decision in *Heydenfeldt* v. *Daney Gold etc. Co.*, 93 U. S. 634.

Dec. 12, 1887—Wording identical to Wyoming's Enabling Act first used in public land grant.
(S. 185, 50th Congress, First Session, p. 33, and legislative history down to passage of substitute bill on Feb. 22, 1889, being the Enabling Act for the States of Washington, Montana, North Dakota, and South Dakota.)

Nov. 5, 1889—Constitution of Wyoming adopted, effective upon ratification thereof by Congress in Enabling Act next referred to.

July 10, 1890—Wyoming Enabling Act.
(Sections 16 and 36 "are hereby granted to said State for the support of common schools * * * and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.")

March 7, 1892—Wyoming requests United States to survey and subdivide (amongst others) Townships 57 and 58 North, Ranges 99 and 100 West, to identify school sections therein.

March 8, 1892—Government enters into contract with Coleman for survey requested.

March 11, 1892—Coleman informed that "survey of the lands * * * requested by the State Board of Control, a Board authorized by the Legislature to select the land donated to the State by the General Government * * *."

April 11, 1892—Commissioner of General Land Office advised of State request.

April 28, 1892—Coleman contract approved by Commissioner.

Aug. 11, 1892—Surveyor General authorized to make personal inspection of surveys executed by Coleman.

Nov. 26, 1892—Surveyor General forwards Coleman surveys and plats to Commissioner, together with field examination.

Dec. 20, 1892—Commissioner of General Land Office accepts surveys as follows: "* * * said surveys are considered satisfactory, and are hereby accepted * * *."

Jan. 5, 1893—Commissioner certifies Coleman account for payment as certified by Surveyor General "* * * which has been compared by this office with the approved plat of the surveys thus executed and found correct; * * *"

July 7, 1914—Survey in field commenced by Davis.

July 14, 1914—Subdivisional survey of Township 58 North authorized by Commissioner.

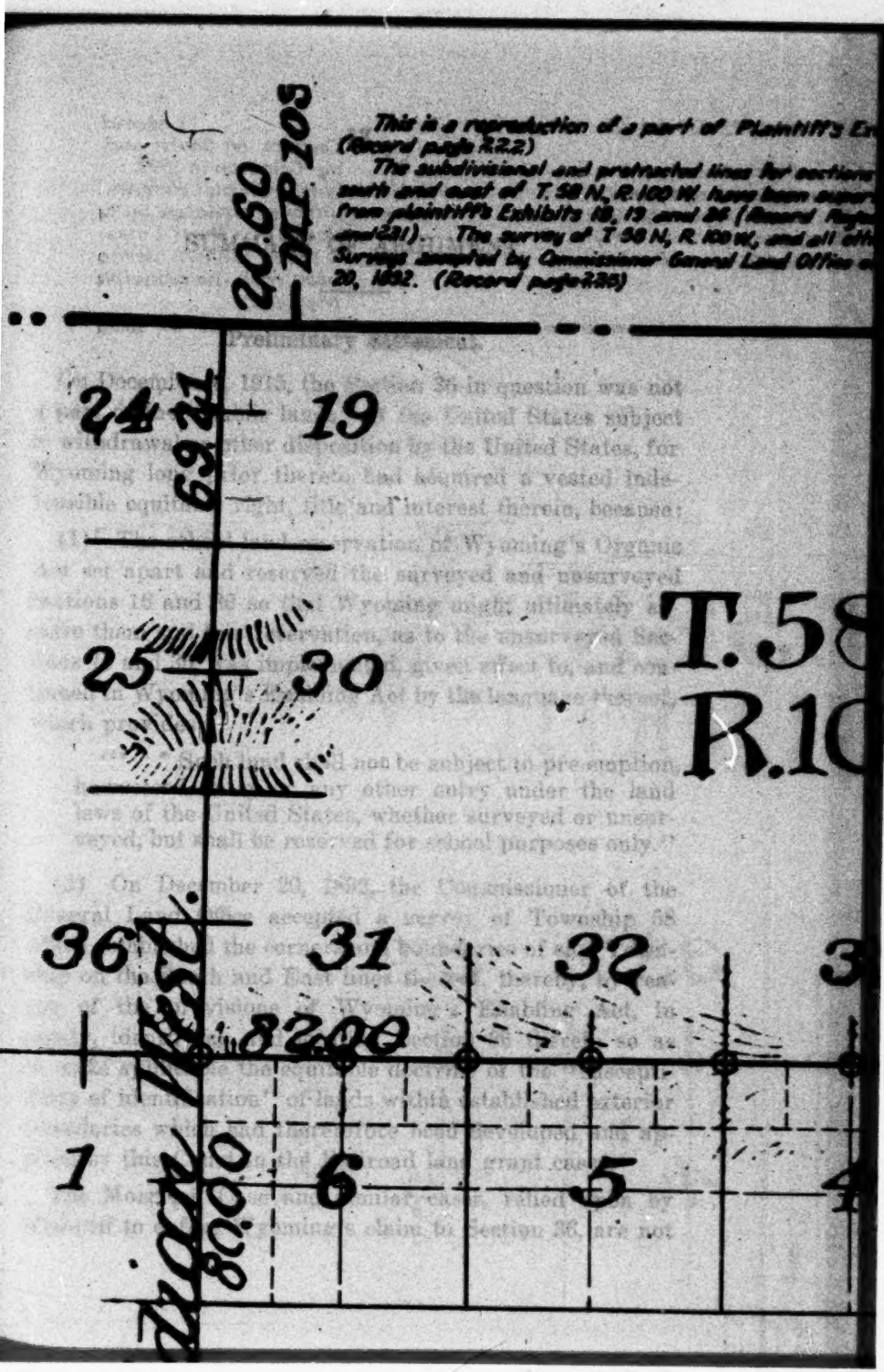
Aug. 24, 1914—Davis survey completed in field.

Dec. 6, 1915—Presidential withdrawal for classification and in aid of legislation, including therein as "unsurveyed" Section 36, T. 58 N., R. 100 W.

Dec. 9, 1915—Subdivisional survey approved by U. S. Surveyor General and forwarded to Commissioner.

July 27, 1916—Subdivisional survey accepted by Commissioner.

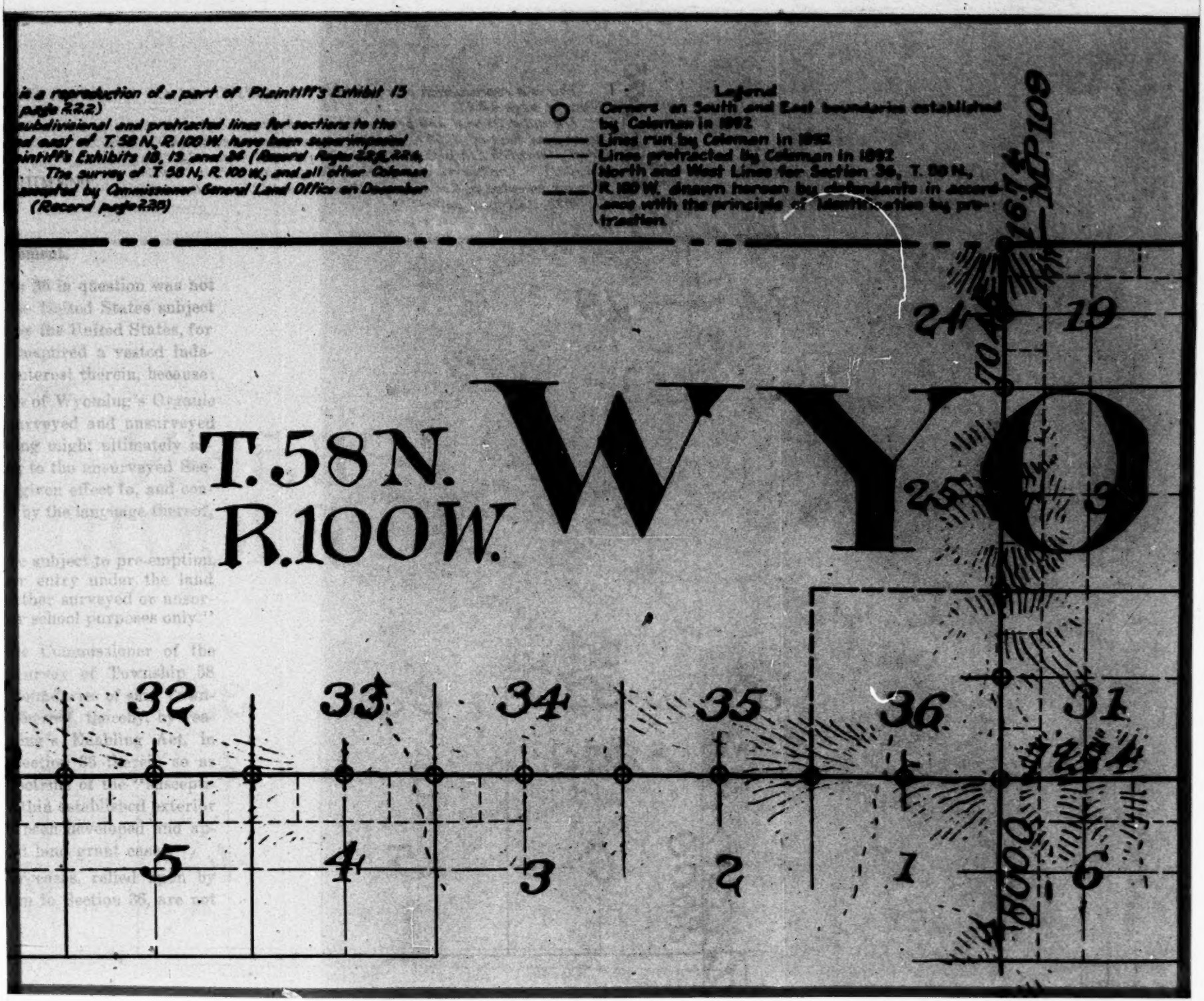
Feb., 1917—Ohio commenced operations under lease from Wyoming.


This is a reproduction of a part of Plaintiff's Ex
(Record page 222)
The subdivisional and protracted lines for sections
south and east of T. 58 N., R. 100 W. have been
from plaintiff's Exhibits 18, 19 and 26 (Record Pa
and 231). The survey of T. 58 N., R. 100 W., and all
Surveys accepted by Commissioner General Land Office
20, 1892. (Record page 235)
20.60
MEP 105
24
19
69.41
25
30
T. 58
R. 10
36
31
32
3
82.00
80.00
1
6
5
4

is a reproduction of a part of Plaintiff's Exhibit 15
page 222.)
subdivisional and protracted lines for sections to the
st east of T. 58 N., R. 100 W. have been superimposed
intiff's Exhibits 18, 19 and 36 (Record Pages 223, 224,
. The survey of T. 58 N., R. 100 W., and all other Coleman
accepted by Commissioner General Land Office on December
(Record page 238)

Legend

- Corners on South and East boundaries established by Coleman in 1892
- Lines run by Coleman in 1892
- Lines protracted by Coleman in 1892
- North and West Lines for Section 36, T. 58 N., R. 100 W. drawn hereon by defendants in accordance with the principle of identification by protraction



SUMMARY OF ARGUMENT.

Preliminary Statement.

On December 6, 1915, the Section 36 in question was not a part of the "public lands" of the United States subject to withdrawal or other disposition by the United States, for Wyoming long prior thereto had acquired a vested indefeasible equitable right, title and interest therein, because:

(1) The school land reservation of Wyoming's Organic Act set apart and reserved the surveyed and unsurveyed Sections 16 and 36 so that Wyoming might ultimately acquire them and this reservation, as to the unsurveyed Sections 16 and 36, was implemented, given effect to, and continued in Wyoming's Enabling Act by the language thereof, which provides:

> "* * * Such land shall not be subject to pre-emption, homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

(2) On December 20, 1892, the Commissioner of the General Land Office accepted a survey of Township 58 which established the corners and boundaries of said Township on the South and East lines thereof, thereby, by reason of the provisions of Wyoming's Enabling Act, in equity, identifying and locating Section 36 therein so as to make applicable the equitable doctrine of the "susceptibility of identification" of lands within established exterior boundaries which had theretofore been developed and applied by this Court in the Railroad land grant cases.

The Morrison Case and similar cases, relied upon by Plaintiff to defeat Wyoming's claim to Section 36, are not

in point because the school land reservation of the Organic Act, which preceded the Enabling Acts involved in those cases, only took effect after survey, and the school land grants of said Enabling Acts were in keeping with the policy of the said Organic Act reservations which looked to them in that they did not contain language of any type or character which imposed any limitation on the power of disposition by the United States prior to survey; and in no instance had there been an accepted survey of the exterior boundaries of the township wherein was situated the designated school section involved.

A complete and exhaustive investigation of the authorities discloses that the fundamental factual situation and the pivotal legal principles of statutory construction and the vesting of equitable rights, presented to and ruled upon by this Court in the Railroad land grant cases, are strictly analogous to the controlling questions presented in the instant case. In no other line of cases has this Court considered and construed substantially similar statutory language in relation to the establishment of a vested equitable right in unsurveyed lands by reason of the establishment and existence of the exterior boundaries of the larger tract within which such land is situated.

A just and well-founded decision in the instant case may only be reached through the application of the logic and reasoning of analogous cases. In no case has the significance of statutory language substantially similar to the language of Section 5 of Wyoming's Enabling Act been construed by this Court in a school land grant case and never by any court has the significance of this language been considered where there was involved an asserted vested equitable right to an unsurveyed designated school land section predicated upon the fact that there had been an accepted United States Survey of the exterior boundaries of the township within which said school section was situated.

AS TO TITLE.

I

On July 10, 1890, Wyoming, Under the Provisions of Its Enabling Act of That Date, Became Vested in Equity With an Indefeasible Right, Title and Interest in School Section 36 Which Could Not Thereafter Be Divested by Any Act on the Part of the United States.

1. The school land grant and reservation of Wyoming's Enabling Act, should be construed in the light of the legislative history of the school land reservation provision of its Organic Act.
2. Wyoming's Enabling Act is a law as well as a grant and such effect must be given to it as would carry out the intent of Congress. This is true regardless of whether or not at the time of such law and grant there existed a present power of identification of the land covered by the grant.
3. Under the decisions of this Court, sections 4 and 5 of Wyoming's Enabling Act, constituted a congressional reservation of all unsurveyed Sections 16 and 36, on behalf of Wyoming, for school purposes and by said reservation the Section 36 herein involved, was set apart and appropriated to Wyoming for said designated use or purpose and did not thereafter constitute or form any part of the "public lands" of the United States, subject to disposition by the officers or agents of the United States under the land laws of the United States.
4. The validity of Wyoming's contention has been sanctioned and supported by the Department of the Interior and by the Courts in decisions construing and discussing identical provisions of the Enabling Acts of the states of Idaho and Washington.
5. *United States* v. *Morrison*, 240 U. S. 192, analyzed and contrasted with, and distinguished from, the instant case.

6. Discussion of Plaintiff's contentions based on Sections 4 and 5 of Wyoming's Enabling Act, Section 6 of the Act of August 9, 1888, and the Act of February 28, 1891.

(Defendants' objections numbered 1 and 3, and 4 to 7 inclusive, and 14(a), to the Master's Findings of Fact, and objections numbered 1 to 6 inclusive, to the Master's Conclusions of Law.)

II.

On December 20, 1892, Upon the Acceptance by the Commissioner of the General Land Office of the Coleman Survey of Township 58, the Exterior Boundaries and Corners of Said Township Were Fixed and Established and the Exterior Boundaries, Corners and Quarter Corners Were Marked So That Wyoming Under the Provisions of Its Enabling Act, Became Vested in Equity With an Indefeasible Right, Title and Interest in School Section 36 Which Could Not Thereafter Be Divested by Any Act on the Part of the United States.

(Defendants' objections numbered 1, 2, 3 and 8 to 11 inclusive, and 14 to the Master's Findings of Fact, and objections numbered 1 and 6 to 8 inclusive and 12 to the Master's Conclusions of Law.)

III.

The Legal Title to Section 36 Vested in Wyoming on July 27, 1916, When the Commissioner of the General Land Office Accepted the Davis Subdivisional Survey of Township 58.

(Defendants' objection Number 15 to the Master's Findings of Fact, and objection Number 11 to the Master's Conclusions of Law.)

IV.

Wyoming Was and Is Entitled to a Finding of Fact and a Conclusion of Law to the Effect That Section 36 Was Not "Known Mineral Land" on or Prior to December 20, 1892.

(Defendants' objections numbered 12 and 13 to the Master's Findings of Fact, and objection Number 9 to the Master's Conclusions of Law.)

AS TO THE ACCOUNTING PHASE OF THE CASE IN THE EVENT IT SHOULD BECOME OPERATIVE.

1. Plaintiff concedes that The Master correctly disposed of all accounting issues and these questions are settled in the event the Court should determine the title issue in favor of Plaintiff and should also confirm the disposition made by The Master of the question of Defendants' good faith. If the Court finds that the record does not support the Finding of The Master as to the Defendants' good faith, the case should be referred back to The Master for further hearing on this point.
2. The Master properly refused to recommend a joint and several judgment against the Defendants for the royalties paid Wyoming because the existing deficit of $64,479.74 exceeds the royalty payments by $47,173.44.

ARGUMENT.

I.

On July 10, 1890, Wyoming, Under the Provisions of Its Enabling Act of That Date, Became Vested in Equity With an Indefeasible Right, Title and Interest in School Section 36 Which Could Not Thereafter Be Divested by Any Act on the Part of the United States.

1. *The school land grant and reservation of Wyoming's Enabling Act, should be construed in the light of the legislative history of the school land reservation provision of its Organic Act.*

Prior to the Wyoming Territorial Organic Act of July 25, 1868, the Territorial Organic Acts had contained a school land reservation provision to the effect that the designated land, after survey by the United States, should be reserved for school purposes.

The school land reservation provision of the Oregon, Minnesota and Wisconsin Organic Acts are in substance identical and are typical of the form of the school land reservation provision used by Congress prior to the organization of the Territory of Wyoming.

In *U. S.* v. *Morrison*, 240 U. S. 192, the Court, in referring to and quoting the school land reservation provision of Oregon's Organic Act, said:

> "* * * In the case of Oregon, the following provision had been made in establishing the territorial government (act of August 14, 1848, chap. 177, Sec. 20, 9 Stat. at L. 323, 330);
>
> "'That when the lands in the said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same

into market, sections numbered sixteen and thirty-six in each township in said territory shall be and the same is hereby reserved for the purpose of being applied to schools in said territory, and in the states and territories hereafter to be erected out of the same.'"

Obviously, under this Act there was no reservation until after there was an approved survey.

In *Minnesota* v. *Hitchcock*, 185 U. S. 373, the Court, in referring to the school land reservation provision of the Minnesota Organic Act, said:

"Turning to the legislation of Congress in respect to school lands in Minnesota, the clause in the act establishing the territorial government has only this significance. It provided that when the lands in the territory should be surveyed sections Nos. 16 and 36 'shall be and the same are hereby reserved', for the purpose of being applied to schools. But the agreed statement shows that these lands were not surveyed until after the act of January 14, 1889, and the agreement with the Indians made in pursuance thereof, and approved by the President March 4, 1900. * * *"

Here again it is plain that there was no reservation until after there had been a survey.

This form of school land reservation constituted a recognition of and acquiescence in the general policy established by the provisions of the Act of February 26, 1859, which provided in part:

"Where settlements, with a view to preemption, have been made before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the preemption claim of such settler; and if they, or either of them, have been or shall be reserved or pledged for the use of schools or colleges in the State or Territory in which the lands lie, other lands of like quantity are appropriated in lieu of such as may be patented by pre-emptors; * * *" (43 U. S. C. A. Sec. 851, p. 108.)

The Act of February 26, 1859, was in effect at the time of the enactment of the Wyoming Territorial Organic Act. Congress, however, in organizing and creating the Wyoming Territory, refused to follow this policy, because experience had disclosed that school land reservations made pursuant to said policy were working out to the detriment of the territories and states created therefrom, in that by reason of the surveys being long delayed, a large part of the most productive and valuable land was lost to the territory and state. This seems to be conclusively established by the legislative history of the school land reservation provisions of Wyoming's Organic Act.

Section 14 of Wyoming's Organic Act, as introduced, read as follows:

> "And Be It Further Enacted, That when the lands in the said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be erected out of the same."

This language follows literally the school land reservation provision of Oregon's Organic Act construed in *United States* v. *Morrison, supra.* The legislative history of the Wyoming Organic Act shows that Section 14 as thus introduced was amended by striking out that part of the section which made the effectiveness of the reservation dependent upon a prior survey.

The discussion which preceded the amendment and the legislative history of the amendment is found in Volume 39, pages 2792 to 2802, Part III, *Congressional Globe, 2nd Edition,* 40th Congress and reads in part as follows:

> "Mr. Pomeroy: I desire to offer another amendment in the same section. As it now stands the six-

teenth and thirty-sixth sections cannot be reserved until after the survey, and that will take a long time, and in the meanwhile every sixteenth and thirty-sixth section that is valuable will be held by a squatter against the interest of the public schools; but if the section can be amended, as I suggest, the sixteenth and thirty-sixth sections will be reserved from the date of the act and can be held only for the purposes herein reserved, that is, for public schools. I move to strike out after the word 'that', in the first line, the words 'when the lands in said Territory shall be surveyed, under the direction of the Government of the United States, preparatory to bringing the same into market;' so that the section will read:

"'That sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to public schools in the State or States hereafter to be erected out of the same.'

"That reserves them now from the passage of the act; but the section as it stands only reserves them after survey, and that will be too late; the best of them will be gone then. I therefore move to strike out the words which I have indicated.

"Mr. Williams: How can you determine where the sixteenth and thirty-sixth sections are unless the lands are surveyed?

"Mr. Pomeroy: You cannot determine it.

"Mr. Conness: You cannot determine it in either case.

"Mr. Williams: I do not know but that the amendment is right; but it seems to me that under it a person might go into this Territory and settle upon the land and make valuable improvements, as they do in all new countries, and when the land is surveyed, if the man is found to be upon the sixteenth or thirty-sixth section his land and his improvements are all taken from him; he is turned out of doors.

"Mr. Pomeroy: If he is on the sixteenth or thirty-sixth section then he settles with the superintendent

or trustees of the schools, whoever they may be, as appointed by the legislature. The Government cannot drive him off. He must settle with the school interests of his State.

"Mr. Conness: He holds it under them.

"Mr. Pomeroy: And he has the opportunity of buying it under such regulations as the State may prescribe after it becomes a State; but unless this amendment be made he can hold the sixteenth and thirty-sixth section against the interest of the schools and in defiance of the State.

"The amendment was agreed to."

"The bill was reported to the Senate, as amended, and the amendments were concurred in."

"The amendments were ordered to be engrossed, and the bill to be read a third time. The bill was read the third time, and passed."

Section 14 of the Act, as enacted, after said amendment reads as follows:

"*And Be It Enacted,* That sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby reserved for the purpose of being applied to public schools in the state or states hereafter to be erected out of the same."

Attention is particularly directed to that portion of Mr. Pomeroy's remarks in which he stated that a person who settled during territorial days on a Section 16 or 36 prior to survey would be compelled to settle with the state, but that he would have an "opportunity of buying it under such regulations as the state may prescribe after it becomes a state."

In this connection it is not only interesting, but important to note that the Wyoming Constitutional Convention included the purchase regulation referred to by Mr. Pomeroy as a part of Section 1, Article 18 of the Constitution of Wyoming.

Section 1, Article 18 of the Wyoming Constitution reads in part:

> "The State of Wyoming hereby agrees to accept the grants of land heretofore made, or that may be hereafter made by the United States to the state, for educational purposes. * * * Such lands shall be disposed of only at public auction to the highest responsible bidder, after having been duly appraised by the land commissioners, at not less than three-fourths of the appraised value thereof, and for not less than $10 per acre; provided, that in case of actual and bona fide settlement and improvement thereon at the time of the adoption of this constitution, such actual settler shall have the preference right to purchase the land whereon he may have settled, not exceeding 160 acres at a sum not less than the appraised value thereof, and in making such appraisement the value of improvements shall not be taken into consideration."

As Section 1 of Article 18 was introduced the provision giving settlers a preference right to purchase did not appear therein, but was included by amendment.

The debate which led to the inclusion of this provision appears in the *Journals and Debates of the Constitutional Convention of Wyoming*, at pages 753 to 758 and reads in part as follows:

> "Mr. Clark: I have an amendment which I wish to offer to this section. That would more properly come in two amendments, and I want to state the object of the amendments before offering them. In the western part of the territory a great many people have settled on these school lands, in some cases long before the government surveys were run. They live there and own improvements on the land, and this amendment is offered for the protection of those who have made actual settlement and improvements upon these school lands, and is for the purpose of giving them a previous right to purchase. * * *"
>
> "Mr. Holden: I think the state should be as gener-

ous in this matter as the United States has been. They provide by law where a party settled upon unsurveyed land that when this land shall be surveyed that the man who settled there before the survey shall have the prior right to buy. In that case the settler has ninety days to perfect his entry, and it seems to me the state should be as generous as the United States has been. Now, I know myself of quite a number of cases where parties have settled on school lands, sixteen or thirty-six years ago. They have made valuable improvements; some of them are of a character they could not remove, irrigating ditches for instance, and it seems to me that the board of appraisers should seek to make the value of these lands so that the party residing there should have the prior right to buy at that price. It would be an injustice to deprive these men of that right.

"Mr. Hoyt: * * * I think there should be a distinction between those who went upon the lands without knowing they were school lands, and those who knew they were. I think that the state is bound to see that it gets the most it can out of these lands, but I think some deference should be paid to those who are already on them.

"Mr. Holden: I would like to say that under the laws of the United States now in operation our territory has leased many of its lands. Many parties had made improvements before they were surveyed, and under the regulations adopted by our territorial authorities, the preference right was given to those who had occupied those lands and improved them, and now believing that they would have the prior right to buy secured to them, they have gone on and made valuable improvements there. Now should they be deprived of their labor to this extent? I think not. They have leased these lands and pay all that the county commissioners require them to pay and will do so until such time as the territory will permit them to buy them."

It is evident that the members of the Wyoming Constitutional Convention considered that the school land reservation of the Organic Act was intended to reserve and with-

draw from settlement or entry the unsurveyed Sections 16 and 36 of the Territory and that they were familiar with the Congressional Debate which conclusively established such intent and purpose; such understanding was disclosed to Congress by the inclusion in the proposed Wyoming Constitution of that portion of Section 1, Article 18, which is above referred to.

Congress, by the Enabling Act, confirmed and acquiesced in such disclosed understanding of the Wyoming Constitutional Convention by that portion of said Enabling Act which reads:

> "* * * and that the constitution which the people of Wyoming have formed for themselves be, and the same is hereby, accepted, ratified, and confirmed."

Before the Master, Plaintiff was successful in brushing aside what seems to us the paramount significance of the established intent and purpose of Congress in enacting the school land reservation provision of Wyoming's Organic Act, by the bald assertion that the Organic Act was not a grant and that Wyoming's rights are necessarily controlled by the terms of its Enabling Act.

If the terms and conditions of the grant and reservation of the Enabling Act were clearly different in any substantial particular from the terms, policy and conditions of the Organic Act reservation, then admittedly the provisions of the Enabling Act would be controlling.

Here, however, we have a controversy as to the proper construction or interpretation of the provisions of the school land grant of an Enabling Act which admittedly contains language obviously designed and used as a means of carrying into effect the terms and policy of a preceding Organic Act school land reservation.

The basic proposition involved here is the intention and purpose of Congress in including in Wyoming's Enabling

Act the provision: "* * * and such lands shall not be subject to pre-emption, homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only." Certainly, if it appears, as it clearly does, that this language is used by Congress with the intent and for the purpose of carrying into effect the terms and policy of the Organic Act school land reservation, then the intent and purpose of Congress in making such Organic Act reservation, which is established by its legislative history, determines the construction that must be given to the above quoted language of Wyoming's Enabling Act.

Once it is determined that the intent and purpose of Congress in enacting the school land reservation provision of Wyoming's Organic Act was that the unsurveyed as well as the surveyed Sections 16 and 36 were reserved for school purposes, then the intention of Congress to carry over this reservation into Wyoming's Enabling Act without any substantial change or modification, is made manifest by the fact that the language of the school land grant of Wyoming's Enabling Act, is obviously designed for and adapted to such purpose and can only be logically and reasonably construed upon this premise.

Under the circumstances presented, the authorities clearly sanction and support the use of the legislative history of the school land reservation provision of Wyoming's Organic Act in construing the provisions of the school land grant of Wyoming's Enabling Act.

50 Am. Jur. 354:

> "In the enactment of a statute, earlier acts on the same subject are generally presumed to have been in the knowledge and views of the legislature which is regarded as having adopted the new statute in the light thereof and with reference thereto. Therefore, in the construction of a statute, reference may be made to earlier statutes on the subject, which are regarded

as in *pari materia* with the later statute. *A comparison of the prior law with the present is considered helpful in determining the true intent of the legislature.* * * *"* (Emphasis added.)

In *St. Louis I. M. & S. R. Co.* v. *United States,* 251 U. S. 198, the Court said:

"* * * But, Congress must be presumed to have known of its former legislation in the Acts of 1853 and 1866, and to have passed the new laws in view of the provisions of the legislation already enacted. * * *"

In *Fussell* v. *Gregg,* 113 U. S. 550, the Court said:

"The provisions of the third section are based on the same policy, and are similar to those of the act of March 3, 1855, *ubi supra,* and must receive the same construction, namely, * * *"

In *Penn Mutual Life Ins. Co.* v. *Lederer,* 252 U. S. 523, the Court said:

"That such was the intention of Congress is confirmed by the history of the noninclusion clause (c) above. The provision in the Revenue Act of 1913, for taxing the income of insurance companies is in large part identical with the provision for the special excise tax upon them imposed by the Act of August 5, 1909; * * *"

2. *Wyoming's school land grant is a law as well as a conveyance and such effect must be given to it as would carry out the intent of Congress. This is true regardless of whether or not at the time of such grant and law there existed a present power of identification of the land covered by the grant.*

Sections 4 and 5 of Wyoming's Enabling Act, provide in part:

Section 4:

"That Sections numbered 16 and 36 in every town-

ship of said proposed state, * * * are hereby granted to said state for the support of common schools. * * *" Section 5:

"* * * and such land shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

In construing Wyoming's Enabling Act, it should be remembered that the above quoted language forms an integral part of a law and therefore such effect must be given to the grant and reservation as will carry out the intent of Congress. This rule is applicable regardless of whether or not at the time said grant, reservation and law took effect there existed any present power of identification of all of the land covered by the grant and the reservation.

United States v. *Southern Pac. R. Co.*, 146 U. S. 570:

"In view of this late and clear declaration, it would be a waste of time to attempt a re-examination of the questions, or a restatement of the reasons which have established these as the settled rules of law in respect to land grants, and made it so that the old common-law rule as to the necessity of identification to a conveyance has not been controlling in determining the scope and effect of a congressional land grant. * * *"

"* * * Illy as it may accord with the common-law notions of identification of tracts as essential to a valid transfer of title, it is fully settled that we are to construe these acts of congress as laws as well as grants; * * *"

" 'It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted

that there must exist a present power of identification of the land, and that, where no such power exists, instruments with words of present grant are operative, if at all, only as contracts to convey. But the rules of the common law must yield in this, as in all other cases, to the legislative will.' "

Admittedly, Wyoming, under its Enabling Act, acquired legal title to all surveyed sections 16 and 36 not theretofore disposed of. The pivotal question in this case concerns the right or power of the United States after the Enabling Act took effect to make a withdrawal or other disposition of the unsurveyed Sections 16 and 36 which would operate to defeat the clear and specific reservation of said unsurveyed Sections to Wyoming for school purposes.

It will be noted that Congress, in order to make it clear beyond doubt that Wyoming would ultimately acquire legal title to all Sections 16 and 36 which were unsurveyed at the time its Enabling Act took effect, not only provided that said unsurveyed sections should not be subject to preemption, homestead entry or any other entry under the land laws of the United States, but also emphasized the effect of this limitation upon the power of disposition by the United States prior to survey by expressly declaring that "such lands shall be reserved for school purposes only."

In the absence of this specific and emphasized reservation, it might be plausibly contended that the language of the Enabling Act stating that said lands "shall not be subject to preemption, homestead entry or any other entry under the land laws of the United States" merely created an obligation on the part of the United States not to transfer or dispose of the lands to a third party, and that such language standing alone would not prohibit the United States from using the lands for its own purpose by way

of forest, water power, petroleum and other types of withdrawals and reservations. It was for the very purpose of guarding against such a contention that Congress, with prophetic vision, added the words "but shall be reserved for school purposes only."

3. *Under the decisions of this Court, Sections 4 and 5 of Wyoming's Enabling Act, constituted a congressional reservation of all unsurveyed Sections 16 and 36, on behalf of Wyoming, for school purposes and by said reservation the then unsurveyed Section 36 herein involved was set apart and appropriated to Wyoming for said designated use or purpose and therefore said land did not thereafter constitute or form any part of the "public lands" of the United States which were subject to disposition by the officers or agents of the United States under the land laws of the United States.*

Under the decisions of this Court, the language of Section 5 of Wyoming's Enabling Act providing "and such land shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only", constituted a Congressional reservation of all of the unsurveyed Sections 16 and 36 at that time not otherwise disposed of.

These decisions also establish that by said Congressional reservation, the lands covered thereby were set apart from the mass of the public lands of the United States and could not thereafter be considered or treated, by the officers and agents of the United States, as forming any part of the public domain subject to disposition under the land laws of the United States.

A United States Survey of the exterior boundaries of

fractional Township 58, in which the Section 36 in question is situated, was accepted by the Commissioner of the General Land Office on December 20, 1892.

A subdivisional survey of said Township 58 was accepted by the Commissioner on July 27, 1916.

On December 6, 1915, a Petroleum Withdrawal Order was made which purported to include said Section 36, with other lands, in Petroleum Reserve No. 41.

Plaintiff's basic contention seems to be that Section 36 was a part of the public lands of the United States on December 6, 1915, and was therefore subject to withdrawal and reservation for classification or other public purposes under 43 U. S. C. A. Sec. 141, which provides in part:

> "The President may, at any time * * * withdraw from settlement, location, sale or entry any of the public lands of the United States, * * * and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders with withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."

It seems obvious that this contention of plaintiff is predicated upon the theory that the Congressional withdrawal of said unsurveyed Section 36, from any type of entry under the land laws of the United States and the specific reservation thereof on behalf of Wyoming for school purposes, was and is meaningless and void.

Upon this premise Plaintiff then contends that Wyoming did not and could not acquire any equitable right, title or interest in said Section 36 until there was an approved subdivisional survey of Township 58, and that until there was such an approved subdivisional survey of Township 58, the United States retained and had a full, complete and unrestricted right and power to dispose of said land as it

might see fit and that there was a valid and lawful disposition by the United States of said land by and through its inclusion in said Presidential Withdrawal Order.

The point under discussion seems to be crucial in its importance because if the decisions of this Court sustain Wyoming in its contention herein, then on this ground alone, Wyoming is, upon the record in this case, entitled to a judgment in its favor.

Congress, under Section 3, Article IV, of the Constitution of the United States, has complete and plenary power over the disposal, withdrawal, reservation and appropriation of lands, surveyed or unsurveyed, belonging to the United States.

Section 3, Article IV, of the Constitution, provides in part:

> "* * * The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; * * *."

United States v. *City & County of San Francisco*, 310 U. S. 16:

> "Article 4, Section 3, Cl. 2 of the Constitution provides that 'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.' The power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.' Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy. * * *"

The decisions of this Court are to the effect that the language of Section 5 of Wyoming's Enabling Act withdrawing the unsurveyed Sections 16 and 36 from preemp-

tion and any type of entry under the land laws of the United States and reserving said lands to Wyoming for school purposes only, constituted an appropriation of said lands to the reservation and grant; that thereupon said lands were severed and set apart from the mass of public lands and were not thereafter subject to withdrawal or other type of disposal.

Wilcox v. *Jackson,* 13 Peters 498:

"We now return to the inquiry whether the land in question falls within any of the prohibitions contained in the act of Congress. Amongst others, lands which may have been appropriated for any purpose whatsoever, are exempt from liability to the right of preemption. * * * Now this is appropriation, for that is nothing more or less than setting apart the thing for some particular use. But it is said that this appropriation must be made by authority of law. We think that the appropriation in this case was made by authority of law. * * *

"* * * But we go farther, and say, *that whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it.*" (Emphasis added.)

Leavenworth, etc. R. R. Co. v. *United States,* 92 U. S. 733:

"And such grants could be treated in no other way, for Congress cannot be supposed to have thereby intended to include lands previously appropriated to another purpose, unless there be an express declaration to that effect. A special exception of them was not necessary, because the policy which dictated the grants confined them to lands which Congress could rightfully bestow, without distributing existing relations and producing vexatious conflicts. *The legislation which reserved them for any purpose excluded*

them from disposal in the manner that the public lands are usually disposed of, and this Act discloses no intention to change the long continued practice with respect to lands set apart for the use of the Government or of the Indians * * *" (Emphasis added).

"We are not without authority that the general words of this grant do not include an Indian reservation. In *Wilcox* v. *Jackson,* 13 Pet. 498, the President, by Proclamation, had ordered the sale of certain lands, without excepting therefrom a military reservation included within their boundaries. The Proclamation was based on an Act of Congress supposed to authorize the sale of these lands, but the court held that the Act did not apply to the case, and then say: *'We go further and say that whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law, proclamation, or sale would be construed to embrace or operate upon it, although no reservation were made of it.'* It may be said that it was not necessary for the court in deciding the case to pass upon this question; but, however this may be, the principle asserted is sound and reasonable and we adopt it as a rule of construction * * * " (Emphasis added).

"Every tract set apart for some special use is reserved to the Government, to enable it to enforce that use. And there is no difference, in this respect, whether it be appropriated for Indian occupancy or for other purposes. There is an equal obligation resting on the Government to see that neither class of reservations is diverted from the uses to which it was assigned. * * *"

Northern Lumber Co. v. *O'Brien,* 204 U. S. 190:

"* * * The Court, however, adhered to its conclusion that the land covered by the grant could only embrace lands which were, at the time, public lands, free from any lawful claim of other parties, unless

there was an express provision showing that the grant was to have a more extended operation,—citing the decision in *Wilcox* v. *Jackson*, 13 Pet. 498, 10 L. Ed. 264, to which we have referred above, *that land once legally appropriated to any purpose was thereby severed from the public domain, and a subsequent sale would not be construed to embrace it, though not specially reserved* * * *" (Emphasis added).

United States v. *Minnesota*, 270 U. S. 181:

"* * * That rule is that lands which have been appropriated or reserved for a lawful purpose are not public, and are to be regarded as impliedly excepted from subsequent laws, grants, and disposals which do not specially disclose a purpose to include them. *Wilcox* v. *Jackson*, 13 Pet. 498, 513, 10 L. Ed. 264; *Leavenworth, Lawrence & Galveston R. R. Co.* v. *United States*, 92 U. S. 733, 741, 745, 23 L. Ed. 634; *Missouri, Kansas & Texas Ry. Co.* v. *Roberts*, 14 S. Ct. 496, 152 U. S. 114, 119, 38 L. Ed. 377; *Scott* v. *Carew*, 25 S. Ct. 193, 196 U. S. 100, * * *"

Under a long line of decisions by the Federal and State courts construing the Railroad land grant statutes in regard to the rights of the railroad in unsurveyed odd numbered sections within the primary grant, it had been established long prior to 1890, that when Congress in enacting the early Railroad land grant statutes, used the language, "and the odd sections of land hereby granted, shall not be liable to sale, or entry, or preemption before or after they are surveyed", intended to and did sever, set apart and appropriate to the grant, the odd numbered sections within the limits of the primary grant so that thereafter said unsurveyed lands were not subject to any other disposition as "public lands" of the United States.

Northern Pac. R. Co. v. *Lilly*, 6 Mont. 65, 9 P. 116, 118, 119 (1886):

"The grant to this company, however, contains a

limitation upon the right to settle upon or pre-empt any of the lands included within the grant after the general route of the road has been fixed. After that event transpires, said lands are reserved from sale and held for the company, whether before or after the same have been surveyed; and if it should be held that the absolute title of the company did not attach until the definite line of location had been fixed, still, the land having been reserved from sale, except by the company, no person could thereafter acquire any title thereto, or interest therein, save by the act of the company.

"Section 6 provides that the president of the United States shall cause the lands to be surveyed for 40 miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption, before or after they are surveyed, except by said company, as provided in this act, but that the general pre-emption laws shall be and the same are extended to all other lands on the line of the road when surveyed, except the lands granted to the company. This section is itself a grant, and a legislative reservation and withdrawal of the lands granted from sale or pre-emption, except by the company. After the general route of the road has been fixed, it provides that the odd sections "hereby granted" shall be reserved from sale or pre-emption, except by the company. That is to say, whenever the odd sections are designated, by fixing the general route of the road, the grant attaches, and becomes certain and absolute. 'And the odd sections of land hereby granted shall not be liable to sale before or after they are surveyed,' except by the company. This prohibition is absolute. This land is reserved from sale by congress. It is a legislative reservation, and takes effect whenever the general route of the road is fixed; * * *"

St. Paul & P. R. Co. v. *Northern Pac. R. Co.*, 139 U. S. 1:

> "* * * The Northern Pacific act directed that the president should cause the lands to be surveyed 40 miles in width on both sides of the entire line of the road, after the general route should be fixed, and as fast as might be required by the construction of the road; and provided that the odd sections of lands granted should not be liable to sale, entry, or preemption before or after they were surveyed, except by the company. They were, therefore, excepted by that legislation from grants, independently of the withdrawal by the secretary of the interior. His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. * * *"

To the same effect are the following: *Southern Pac. R. Co.* v. *Orton*, 32 F. 457; *Wood* v. *Burlington & Missouri River R. R. Co.*, 14 Otto 329.

In *Sherman* v. *Buick*, 93 U. S. 209 (decided 1876), the Court construed the California school land grant which formed a part of the Act of March 3, 1853, 10 Stat. at L. 246.

By Section 6 of said Act, Sections 16 and 36 in each township, whether surveyed or unsurveyed, were granted to the State of California for school purposes. Section 7 of said act, however, specifically provided that Sections 16 and 36, prior to survey, should be subject to preemption and reservation for public uses.

Section 6 of the Act provided in part:

> "All the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, which shall be, and hereby are, granted to the State for the purposes of public schools in each township; and, with the exception of lands appropriated under this Act, or reserved by competent authority, and excepting, also, the lands

claimed under any foreign grant or title, and the mineral lands, shall be subject to the preemption laws of the 4th of September, 1841, * * *"

Section 7 of the Act provided in part:

"That when any settlement, by the erection of a dwelling-house, or the cultivation of any portion of the land, shall be made upon the 16th and 36th sections before the same shall be surveyed, or when such sections may be reserved for public uses, or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof."

This Court, in holding that the provisions of Section 6 granted "away" to California, Sections 16 and 36, whether surveyed or unsurveyed, and conferred on California inchoate rights therein, but that the provisions of Section 7 of the Act, nullified such grant, said in part:

"It is obviously the main purpose of the section to declare that, after the lands are surveyed, they shall be subject to sale, according to the general land system of the government; and, second, to subject them to the right of preemption as defined by the Act of 1841, and to extend that right to lands unsurveyed as well as to those surveyed. But here it seemed to occur to the framer of the Act, that California, like other States in which public lands lay, ought to have the 16th and 36th sections of each township for school purposes, and that they should not be liable to the general Preemption Law, as other public lands of the government would be. He accordingly injected into the sentence the grant of these lands to the State and the exception of them from the operation of the Preemption Law of 1841, together with other lands which in like manner were neither to be sold nor made subject to preemption. These were: lands appropriated under the authority of that Act, or reserved by competent authority; lands claimed under any foreign grant or title *i. e.* Mexican grants), and mineral lands.

All these were by this clause exempted from sale and from the general operation of the Preemption Laws.

"But the experience of the operation of our land system in other States, suggested that it might be ten or twenty and, in some instances, thirty years before all the surveys would be completed and the precise location of each school section known. In the meantime, the State was rapidly filling up by actual settlers on these lands, whose necessities required improvements, and that those improvements, when found to be located on a school section, should have some protection. What this protection should be, and how the rights of the State should be also protected, and the relative rights of the settler and of the State, under these circumstances, is the subject of a distinct section of the Act, the one succeeding that we have just considered.

"That Section 7 provides: 'That when any settlement, by the erection of a dwelling-house, or the cultivation of any portion of the land, shall be made upon the 16th and 36th sections before the same shall be surveyed, or when such sections may be reserved for public uses, or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof.' That it was the purpose of this section to provide a rule for the exercise of the right of preemption to the school lands granted by the previous section cannot be doubted. The reason for this is equally clear, namely: that these lands were not only granted away by the preceding section and inchoate rights conferred on the State, but they were, with other classes of lands, by express terms excepted out of the operation of the preemption laws which it was a principal object of that section to extend to the public lands of California generally."

In the Buick Case, the Court was presented with a situation where Congress, by the provisions of Section 6 of California's school land grant statute, had, in express terms, granted to the State of California Sections 16 and

36, whether surveyed or unsurveyed, and had specifically provided that said lands should not be subject to preemption and then, had, by the provisions of the following Section 7 of the Statute, just as specifically declared that prior to survey, said Sections 16 and 36, were subject to preemption and to reservation for public uses. Faced with this situation the Court applied the rule that the provisions of a subsequent section of a statute in conflict with the provisions of a preceding section, are controlling and operate as a nullification of the preceding, conflicting or contradictory provisions of the statute.

In construing Wyoming's school land grant statute, we are presented with the opposite situation. Section 4 of Wyoming's Enabling Act, without any reference to survey, provides that Sections 16 and 36 are granted to the State in support of common schools, unless otherwise disposed of. In the following Section 5 of the Statute, it is provided "and such land shall not be subject to preemption, homstead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

Under the California school land grant statute, by Section 6 thereof, as construed by this Court in the Buick Case, Sections 16 and 36, whether surveyed or unsurveyed, were granted to California, and it was provided that said lands should not be subject to preemption. However, in the following Section 7 of the Statute, conflicting and contradictory provisions were inserted which provided that prior to survey, Sections 16 and 36 should be subject to preemption and reservation for public uses. The Court held that this later specific provision providing that said school lands prior to survey, should be subject to preemption and to reservation for public uses, must be given effect and that this resulted in the nullification of the preceding contradictory provisions of the Statute.

In the California school land grant statute, the subsequent and final declaration of Congress in regard to the withdrawal of the unsurveyed Sections 16 and 36 from preemption and their appropriation to the grant was, that the unsurveyed Sections 16 and 36 prior to survey, were subject to preemption and reservation for public uses, and that said lands were not appropriated to the grant unless at the time they were surveyed they were not occupied by a settler or reserved for a public use. In the Buick Case, this later and final provision of the Statute was held to nullify the preceding and directly contradictory provisions of the Statute.

In Wyoming's school land grant statute, the final provision of the Statute in order of arrangement in regard to the withdrawal of the unsurveyed Sections 16 and 36 from preemption and entry and their reservation and appropriation to the grant, is the clear, direct and emphasized withdrawal of said lands from preemption and entry and the equally clear, direct and emphasized reservation and appropriation of said unsurveyed Sections 16 and 36, to the grant.

It is difficult to conceive how Congress could have designed and used language more apt and carefully tailored for this purpose than "such land shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

The rather unusual clarity and emphasis of the language used by Congress in Wyoming's Enabling Act in withdrawing the unsurveyed Sections 16 and 36 from preemption and entry and appropriating them to the grant by a reservation of them to Wyoming for its schools, is, we feel, explained by the desire on the part of Congress to carry out the terms and policies of the school land reservation of

Wyoming's Organic Act and to also, beyond any question, take Wyoming's school land grant out from under the decision of this Court in *Heydenfeldt* v. *Daney Gold and Silver Mining Co.*, 93 U. S. 634. (Decided in March, 1877.)

In the Heydenfeldt Case, the Court construed the provisions of the school land grant of the Nevada Enabling Act which provides:

> "That sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any Act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be, shall be and are hereby granted to said State for the support of common schools."

The court held that while this grant was in terms *praesenti* it should be construed as a grant *in futuro* because, at the time of the enactment of the Nevada Enabling Act in 1864, Congress had not authorized any disposition of the public lands within the Territory of Nevada and that, therefore, the words "otherwise disposed of" and the indemnity provision of the statute should be construed as evidencing an intent on the part of Congress that until survey, Sections 16 and 36 should be open to all types of entry under the land laws of the United States. This Court said in part:

> "* * * Congress knew, as did the whole country, that Nevada was possessed of great mineral wealth, and that mineral lands should be disposed of differently from those which were fit only for agriculture. No method for doing this had then been provided; but Congress said to the people of the Territory, 'You shall, if you decide to come into the Union, have for the use of schools a quantity of land equal to two sections in every township and the identical sections themselves, if on survey no one else has any claim to them; but until this decision is made and the lands

> surveyed, we reserve the right either to sell them or dispose of them in any other way that commends itself to our judgment.' *This right of disposition is subject to no limitations and the wisdom of not surrendering it is apparent.* * * *'' (Emphasis added.)

When this language is paraphrased so as to make it applicable to Wyoming's school land grant it reads:

> "Congress said to the people of the Territory of Wyoming, 'You shall, if you decide to come into the Union, have for the use of schools Sections numbered 16 and 36 if no one else at this time has any claim to them and, in order that you may be assured that you will obtain said Sections 16 and 36 of every township, it is understood and agreed that such land shall not be subject to preemption, homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.' ''

In the Heydenfeldt Case, the Court construed the school land grant of the Nevada Enabling Act as containing a stipulation to the effect that the United States should retain full and complete legal and equitable title, to Sections 16 and 36, until said sections were surveyed and that prior to such survey the United States had the absolute and unlimited right to dispose of said lands through preemption, homestead or any other character of entry under the land laws of the United States or in any other way it saw fit.

The Wyoming Enabling Act was enacted July 10, 1890, some thirteen years after the decision in the Heydenfeldt Case.

The attempt made by the plaintiff to apply the holding in the Heydenfeldt Case to the Wyoming Enabling Act is nothing short of an attempt to read out of the Enabling Act language that was undoubtedly made a part of it for

the very purpose of displacing the Heydenfeldt holding and preventing the application of that case to the Wyoming Enabling Act. It amounts to a denial of the power of Congress to change its policy in regard to school land grants.

Presumably the Congress when it enacted the Wyoming Enabling Act had full knowledge of the ruling made in the Heydenfeldt Case, as well as the ruling made in *Sherman* v. *Buick, supra.* The Heydenfeldt opinion, handed down thirteen years before the Wyoming Enabling Act was enacted, announced a rule of construction that must have been well known at least to the members of the Congress elected from the Western States, all of which States were vitally interested in any and all questions affecting Sections 16 and 36 that had been granted to them for school purposes. The members of Congress were also presumptively fully acquainted with the construction that had been applied in the Railroad land grant cases. In enacting the Wyoming Enabling Act they used language entirely different from that employed in the Nevada Enabling Act or in the California Act and that conformed fully to the construction that had been previously applied by this Court to Railroad land grants.

This difference in language implies a difference in intention and imperatively requires a difference in construction. It must be assumed that the different language was deliberately chosen for the purpose of bringing about a different construction. *United States* v. *McClure*, 305 U. S. 472, 477, 478; *United States* v. *Perryman*, 100 U. S. 235, 238.

If Congress had intended that the rule announced thirteen years before in the Heydenfeldt Case should be applied to the land grant made to Wyoming in the Enabling Act of July 10, 1890, why did it not employ the same

language that it had previously employed in the Nevada Enabling Act? That language had been already construed by this Court and that construction was well known throughout the Western States and to the members of Congress; certainly to those coming from the Western States. The Congress could have used the Nevada Act as a pattern, already judicially considered and construed. It did not do this. Instead, it used entirely different language. It not only made an immediate grant of the two sections to Wyoming without reference to the matter of survey, but it further provided in Section 5 that, whether surveyed or unsurveyed, the lands should not be subject to preemption or any kind of entry under the laws of the United States and that the same should immediately constitute a reservation for a "public purpose," that is, for "school purposes only." Instead of permitting the grant to be displaced by a subsequent disposition to promote the "public interests," as was true of the statute construed in the Heydenfeldt Case, it selected in that Act the "public interest" that was to be promoted and created an immediate reservation to promote that particular interest.

Are these words, deliberately selected and intentionally made a part of the Act, to be now taken out of the Act by judicial construction? These provisions having been put in in express terms, are they now to be taken out by judicial construction and the Heydenfeldt rule applied even though the intention of Congress to displace that rule in respect to the Wyoming Act is obvious?

4. *The validity of Wyoming's contention has been sanctioned and supported by the Department of the Interior and by the courts in decisions construing and discussing identical provisions of the Enabling Acts of the States of Idaho and Washington.*

Sections 4 and 5 of the Enabling Act of Idaho, and Sections 10 and 11 of the Enabling Act of Washington, are identical to Sections 4 and 5 of the Wyoming Enabling Act in regard to the subject matter involved here.

Washington's Enabling Act took effect February 22, 1889; Idaho's Enabling Act took effect July 3, 1890; and Wyoming's Enabling Act took effect July 10, 1890.

In *F. A. Hyde & Co.*, 48 L. D. 132 (decided in 1902), the Department of the Interior considered and construed the said school land grant provisions of Washington's Enabling Act and ruled that the unsurveyed Sections 16 and 36 in the State of Washington, were not subject to settlement or entry or other disposition on the part of the United States because the title to said lands was in the State of Washington under its school land grant.

It appears from this decision that in 1900, F. A. Hyde & Co. made a selection of a portion of an unsurveyed Section 16 in the State of Washington in lieu of land in California. This selection was held for cancellation for the specifically assigned reason "That the title to the land selected is in the State of Washington, being school lands and is not therefore subject to selection." Presumably, the Department of the Interior, in rendering this decision, had in mind the decision in the Heydenfeldt Case, but at that time the Department of the Interior apparently understood that Congress intended to safe-guard Washington from the effect of the Heydenfeldt decision by the inclusion in Section 11 of its Enabling Act the language "such land

shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

In the case of *Balderston* v. *Brady*, 17 Idaho 567, (decided January, 1910) the Supreme Court of Idaho construed the identical provisions of the school land grant of Idaho's Enabling Act exactly as said provisions had been construed by the Department of the Interior, in the F. A. Hyde & Co. decision. The Court said in part:

> "It will be observed that the language of this grant is '*in praesenti.*' The grant would therefore seem to be a present grant. The act says that sections '16 and 36 in every township of said state * * * are hereby granted to said state for the support of common schools.' It also provides for the selection by the state of 'indemnity lands' to reimburse the state 'where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any act of Congress.' This evidently had reference to the time of the passage of the act, and meant that lieu or 'indemnity lands' might be selected for such lands as had been sold or disposed of at the time of the admission of the state. This is accentuated by the provisions of the latter part of section 5, saying that no such lands, 'whether surveyed or unsurveyed,' shall be 'subject to pre-emption, homestead entry, or any other entry under the land laws of the United States.' This act, it will be observed, is different from most of the previous land laws, as well as land grants, in that it specified and included 'unsurveyed' lands and thereby withdrew all the 'unsurveyed' sections 16 and 36 from settlement or 'entry under the land laws.'"

In *United States* v. *Bonner's Ferry Lumber Co.*, 184 F. 187, (D. C. Idaho, Dec. 5, 1910), the Court had occasion, in an action brought by the United States to recover damages

for the cutting of timber upon an unsurveyed Section 36 in Idaho, to consider Sections 4 and 5 of Idaho's Enabling Act. The Court, after holding that it was not necessary to determine whether or not Idaho had, under its Enabling Act, acquired a vested equitable right to ultimately acquire title to the unsurveyed Section 36, said in part:

"Even if it be assumed that the United States has not the legal right to convey the lands to third persons, or, by including them in reservations, permanently to withhold them from the state, it must be held at least that until the lands are surveyed it retains the legal title, and that the title of the state is therefore not complete. At most the state has but an equitable title, and until an official survey is made exact identification of the grant is impossible. It is therefore thought that the demurrer is ruled by the decision of the Supreme Court in *United States* v. *Montana Lumber Manufacturing Company,* 196 U. S. 573, 25 Sup. Ct. 367, 49 L. Ed. 604. That was an action brought by the United States against the defendant lumber company to recover the value of certain timber alleged to have been cut and removed by the defendant from unsurveyed lands, which, when surveyed, would be embraced in a section within the limits of the grant made by Congress to the Northern Pacific Railroad Company. The defense there relied upon was very similar to the defense set up in the present answer. While the lands from which the timber had been removed had never been officially surveyed by the government, they had been located by surveyors employed by the railroad company. The third section of the act granting lands in aid of the Northern Pacific Railroad Company contains the usual granting words: 'That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns', etc.—language which, as will be observed, is similar to that of section 4 of the act under consideration, and which, as was remarked by the court, has been frequently held to import a present grant. In the course of the opinion it is said:

" 'The equitable title becomes a legal title only upon the identification of the granted sections. *Deseret Salt*

> *Co.* v. *Tarpey,* 142 U. S. 241, * * * Until the identification of the even and odd numbered sections, the United States retained a special property, at least, in the timber growing in the township; and this was sufficient to enable it to recover the value of the timber cut and removed by the defendants. * * *.'"

Rogers v. *Hawley,* 19 Idaho 751, was decided by the Supreme Court of Idaho on May 10, 1911. This case involved the power of the Land Board of Idaho to exchange the State's right, title or interest in an unsurveyed school section for a like area of surveyed land. The Court did not reverse or depart from the basic principle announced in *Balderston* v. *Brady.* The decision of the Court, holding that the Land Board had authority to make the proposed exchange of an unsurveyed school section for a surveyed section of public land, was predicated upon two Acts of the Idaho Legislature enacted in 1911, which in substance provided that the Land Board should have power to relinquish and exchange both surveyed and unsurveyed school land sections.

Newton v. *State Board of Land Com'rs.,* 37 Idaho 58, was decided by the Supreme Court of Idaho in March, 1923. Here, the question involved was the power of the Idaho Land Board to exchange a surveyed school section for another surveyed section of public land. The Supreme Court of Idaho, in holding that the Land Board had no power to make the proposed exchange, referred with approval to the decision in *Balderston* v. *Brady, supra.* The Court said in part:

> "The Idaho Admission Bill, containing the land grants by the government to the state found in sections 4 and 5 above quoted, together with the acceptance by the Congress of the provisions of the Constitution regulating the manner of locating such lands and the disposition thereof, constitute a compact between the government and the state, which neither may abrogate or modify without the consent of the other party to the

pact. It is hardly conceivable that the government would attempt to abrogate or modify the terms of this agreement without the consent of the state, and unless such provisions conflicted with the federal Constitution, the state could not do so without the consent of the United States.

"It has been held that where Congress admits a state into the Union under a Constitution which the people have formed, the provisions of such Constitution are invested with all the authority conferred by any act of Congress. *McCornick* v. *Telegraph Co.*, 79 Fed. 449, 25 C. C. A. 35, L. R. A. 684; *Farm Investment Co.* v. *Carpenter*, 9 Wyo. 110, 61 Pac. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; *Short* v. *Praisewater*, 35 Idaho 691, 208 Pac. 844.

"Controversies which have arisen over the character and extent of the title which a state takes to sections 16 and 36 when unsurveyed, under grants similar to that in the Idaho Admission Bill, have given rise to many decisions by the courts, departmental decisions, and polemic discussions by eminent members of the bar, that would fill volumes, and are too numerous to be even briefly reviewed. They are not of controlling importance, since the question here presented relates only to surveyed school sections 16 and 36.

"In *Balderston* v. *Brady*, 17 Idaho 567, 107 Pac. 493, in an exhaustive and able opinion by Ailshie, J., this court held that the grant contained in section 4 of the Admission Bill by its terms was clearly a grant in praesenti, and included unsurveyed as well as surveyed lands; that the indemnity clause found in section 5, providing that, where such sections or any part thereof had been sold or otherwise disposed of by or under the authority of any act of Congress, indemnity lands might be selected, had reference to lands sold or disposed of at the time of the passage of the Admission Bill, which was July 3, 1890, because this act provided that such lands should not thereafter be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but should be reserved for school purposes only."

The Supreme Court of Washington first considered and construed the provisions of Sections 10 and 11 of Washington's Enabling Act, which are similar to Sections 4 and 5 of Wyoming's Enabling Act, in the case of *State* v. *Whitney*, 66 Wash. 473, 120 P. 116 (Jan. 1912). The Court said in part:

> "* * * The Heydenfeldt Case was decided in 1877. Our enabling act was approved February 22, 1889, and was the first federal grant of lands to new states subsequent to the decision in that case. Could we not assume that at the time it chose the language of our enabling act, Congress had in mind the decision in the Heydenfeldt Case? and because thereof incorporated into section 11: 'Such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States whether surveyed or unsurveyed, but shall be reserved for school purposes only.' Whether the decision in the Heydenfeldt Case had any influence over Congress or not in choosing its language in section 11, what other construction can be given to these words than that Congress meant to emphasize its intention to make a present grant, and to put it beyond any future controversy or necessity of construction by courts or land departments, that the United States did forever thereby relinquish all its title, and such lands should thereafter be subject to no form of entry under federal sanction, whether surveyed or unsurveyed? We therefore hold that the words of grant in our enabling act are words of present grant, and that when, by the adoption of its constitution, the state affirmed the provisions of the enabling act and such constitution was approved by the United States, and the state of Washington thereupon fully admitted into the Union, the grant defined in the enabling act took effect as of its date, and passed the entire title of the United States as fully and completely as though such sections 16 and 36 had been previously surveyed, and were then capable of exact identification."

In 1913 a statute was enacted in Washington authorizing the Commissioner of Public Lands to exchange unsurveyed Sections 16 and 36, within reservations created by the United States, for other lands of the United States. This right of exchange as far as the United States was concerned, was given by the provisions of the Act of February 28, 1891. (43 U. S. C. A. Sec. 681.)

The case of *Thompson* v. *Savage,* 110 Wash. 486, decided in March 1920, involved a situation where the Commissioner of Public Lands was about to make such exchange and the Attorney General sought to enjoin or prohibit such exchange upon the theory that the full and complete title to the unsurveyed school sections passed to Washington under its Enabling Act and that therefore the legislature was without power to authorize any disposition of said lands except in strict keeping with the Washington Constitution.

In the Whitney Case, the Supreme Court of Washington, in construing the language of Section 11 of Washington's Enabling Act, had held that this language, when considered in the light of the Heydenfeldt decision, established an intent upon the part of Congress that Washington, under its Enabling Act, acquired full legal title to the unsurveyed Sections 16 and 36 just as it acquired legal title to the surveyed Sections 16 and 36. In the Savage Case, the Court reconsidered this question and held that as the Court then understood the Heydenfeldt Case, it established a federal rule to the effect that Washington did not, upon the effective date of its Enabling Act, acquire full and complete legal title to unsurveyed Sections 16 and 36. The decision goes no further than this. The Court said in part:

> "Our problem, then, is manifestly reduced to this: Was our school land grant a grant in praesenti, in the sense that title to all sections 16 and 36 within the state, those which were necessary to be eventually identified by a government survey as well as those which

were then so identified, vested immediately in the state upon its admission to the Union. * * *"

"In the light of the decision of the federal Supreme Court in the Heydenfeldt Case, as interpreted in the Morrison Case above quoted from, we cannot escape the conclusion that the decision of this court in *State* v. *Whitney*, holding that our school land grant was one in praesenti of unsurveyed as well as surveyed sections, completely vesting title in all of said sections at the time of the grant, must now be regarded as erroneous, and no longer controlling upon that federal question."

The decision was carefully limited to a consideration of whether or not Washington had acquired a full and complete title to the unsurveyed designated school sections under its Enabling Act.

No question as to the vesting in Washington of an equitable right to ultimately acquire full legal title to the unsurveyed designated school sections upon an accepted subdivisional survey of the townships in which they were situated was presented or considered by the Supreme Court of Washington in the Savage Case.

It is particularly important to note that no question as to the vesting in Washington of an equitable right ultimately to acquire the unsurveyed designated school sections by reason of the language of Section 11 of its Enabling Act, plus their susceptibility of identification by reason of an accepted United States Survey of the boundaries of the townships in which they were situated, was presented or considered by the Supreme Court of Washington in the Savage Case.

5. *United States* v. *Morrison*, 240 U. S. 192, *analyzed and contrasted with and distinguished from the instant case.*

An analysis of the Morrison Case seems clearly to disclose that it does not bar the acceptance in this case of the construction of its school land grant and reservation contended for by Wyoming, and which, it appears from the Master's Report, he would have adopted as sound and equitable but for his understanding that this decision stood as an impassable barrier thereto.

On page 21 of his report (R. 446), the Master states:

> *"Were this question not foreclosed by a decision of this Court in United States* v. *Morrison, 240 U. S. 192, the arguments of the defendants would be unanswerable.* * * *"* (Italics supplied.)

A note on page 23 of his report (R. 448) reads as follows:

> "[1] In applying the rule of strict construction to school land grants it has always seemed to me that the court did not give consideration to the true relationship created between the Federal Government and the States by these enactments. In each case the grant created a charitable trust, with the Government the trustor, the State the trustee, and the future schools and school children the beneficiaries. The rule of construction, therefore, should have been a liberal one favoring the trustee and the beneficiaries and where the meaning was debatable that construction which increased rather than diminished the corpus should have been adopted."

The Master's view that the decision in the Morrison Case was determinative of the construction of the school land grant provisions of Wyoming's Enabling Act and that he was therefore not free to apply what seemed to him "unanswerable" reasoning and equitable principles,

seems to be primarily predicated upon the weight which he gave to the interpretation and effect given by the Supreme Court of Washington in the Savage Case to the opinion in the Morrison Case.

The Morrison Case was an action by the United States to quiet title to a Section 16 in Oregon. It appears therefrom that prior to May 27, 1902, "no survey of any kind" had been made by the United States of the lands involved. On June 2, 1903, a field survey was approved by the United States Surveyor General of Oregon and on June 8, 1903, the plats and field notes of this survey were transmitted to the Commissioner of the General Land Office. Objections were made to the survey and additional surveys were made and additional field notes submitted. On January 31, 1906, the Commissioner accepted the survey. On December 10, 1906, Oregon issued a certificate of sale covering a portion of said Section 16 and thereafter, on July 12, 1910, a deed, predicated upon said certificate, was issued.

The school land reservation provision of Oregon's Organic Act (August 14, 1848) provided:

> "That when the lands in the said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same is hereby, reserved for the purpose of being applied to schools in said territory, and in the states and territories hereafter to be erected out of the same."

The school land grant provisions of Oregon's Enabling Act (February 14, 1859) provides:

> "That sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been

sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools."

The above quoted language of Oregon's Organic Act had been used in all of the preceding Organic Acts which contained a school land reservation provision. This language was used in recognition of and to implement the then prevailing policy of keeping the designated school land open to preemption and entry so as to promote the early and rapid settlement and development of the lands of the Western Territories and States.

All the Enabling Acts which had preceded Oregon's were substantially similar to Oregon's in that they imposed no limitation or restriction upon the power of the United States to dispose of designated unsurveyed school lands from the effective date of the Enabling Act and down to the time that there was an accepted United States survey which fixed the status of said lands and made them susceptible of identification.

All these Organic Acts and all these Enabling Acts, as to the designated school lands, proceeded upon the same basic policy, *i. e.*, that these lands were to remain subject to preemption or entry or other disposition by the United States until their status had been fixed by an accepted United States survey which made them capable of identification.

Plaintiff's contention that the Morrison Case is controlling seems to be primarily predicated upon that portion of the opinion which reads:

"* * * It is also urged that the court (the court here referring to its opinion in the Heydenfeldt Case involving the Nevada Enabling Act) emphasized the fact that there had been no sale or disposition of the public lands in Nevada prior to the enabling act, and therefore that the clause could refer only to future

disposition; whereas, in the case of Oregon, there had been earlier provisions for the disposal of the public domain. But Congress used the same phrase substantially in nearly every one of the school grants, and it was the manifest intention to place the states on the same footing in this matter. The same clause, relating to the same subject, and enacted in pursuance of the same policy, did not have one meaning in one grant and a different meaning in another; it covered other dispositions, whether prior or subsequent, if made before the land had been appropriately identified by survey and title had passed. * * *"

The controlling significance which Plaintiff attaches to this portion of the opinion in the Morrison Case, seems obviously unwarranted. Certainly it cannot be reasonably urged that Congress did not have power to change its policy in regard to whether or not the unsurveyed designated school lands should be subject to preemption or other disposition by the United States prior to an accepted United States survey which fixed their status and made them susceptible of identification. No one can question the logic and reasoning of the Court in pointing out that Congress intended that the states admitted under the policy of keeping the designated school lands subject to preemption and entry and other disposition on the part of the United States until after survey should stand "on the same footing."

We, however, submit that by this language the Court did not intend to hold that Congress might not change its policy in the light of changing circumstances and the established results of the former policy, and that when it did so, such change in policy written into later Enabling Acts would not be given effect by the Courts. *United States* v. *City of San Francisco*, 310 U. S. 16.

The wisdom of the policy of making the designated

unsurveyed school land subject to preemption, entry and other disposition by the United States prior to survey, has, from an early date, been questioned and debated. During almost all of the time during which territories were being created this policy, although under attack from time to time, prevailed. It was not until near the end of this period when the Wyoming Territory was organized on July 25, 1868, that the critics of this policy were finally able to satisfy Congress that a policy which would augment the corpus of the trust for schools was more important than the policy of promoting the early and rapid settlement and development of the lands of the Western Territories and States. By this time, however, experience had satisfied a majority of Congress that the policy of making the designated school lands subject to preemption and entry until after survey was resulting in the loss to the public schools of all of the valuable and productive designated school lands and this policy was repudiated by Congress and the contrary policy of withholding the designated unsurveyed school lands from preemption, entry and other disposal by the United States and making a specific reservation of them for the public schools was adopted. This is conclusively established by the legislative history of Wyoming's Organic Act.

Section 14 of this Act, as introduced, proposed that Congress continue the policy of making the designated school lands subject to preemption and entry prior to survey through and by means of the customary provision that: "When the lands in said Territory shall be surveyed under the direction of the United States preparatory to bringing the same into market." An amendment striking all reference to survey was adopted for the avowed and declared purpose of reserving the unsurveyed Sections 16 and 36 of the Territory of Wyoming from the date of the Act to the end that the more productive and valuable

Sections 16 and 36 should not be lost to the State through preemption and entry by reason of the established long delay incident to the completion of the surveys of the Western lands.

This policy of withholding the designated unsurveyed school lands from preemption was proposed as early as 1853 and in the first instance was incorporated as a part of the school land grant to California by Section 6 of the Act of March 3, 1853 (10 Stat. at L. 246). At that time, however, Congress was not entirely satisfied as to the merit of this policy under the then existing conditions and the provisions of Section 6 of the statute were nullified by the provisions of the succeeding Section 7 which specifically reinstated the old policy by providing that the designated school lands prior to survey should be open to preemption.

In the Heydenfeldt Case, this Court ruled that the school land grant of an Enabling Act, which followed an Organic Act which had authorized the preemption, entry and other disposal by the United States of designated school lands prior to survey which used the words "and where such sections have been sold or otherwise disposed of" immediately following the designation of Sections 16 and 36 and immediately preceding the words of *praesenti* grant, and which imposed no limitation upon the power of the United States to dispose of the designated school lands prior to an accepted United States survey thereof, continued in force and effect the policy of the Organic Act which looked to said grant of making the designated unsurveyed school lands subject to entry and other disposition by the United States until there was an accepted United States survey which fixed the status of said lands and made them capable of identification.

The Heydenfeldt Case was decided in 1877 and the first

Enabling Act thereafter was the Enabling Act of February 22, 1889, under which Washington, Montana and North and South Dakota came into the Union.

The decision in the Heydenfeldt Case had established that if Congress in 1889 still felt that the policy of making the designated unsurveyed school lands subject to preemption and entry and other disposition by the United States after the effective date of an Enabling Act and down to the time of an accepted survey which fixed the status of said lands and made them capable of identification should be continued, then all Congress had to do was to follow the wording of the Nevada Enabling Act which, under the decision in the Heydenfeldt Case, had become an adjudicated pattern for continuing this policy in effect. Congress, however, determined that this policy should not be continued in regard to the designated unsurveyed school lands in Washington, Montana and North and South Dakota. In order to reject this policy and adopt the opposite one, Congress inserted into this first Enabling Act following the Heydenfeldt Case, by clear, specific and emphatic terms, the limitations upon the power of the United States to dispose of said lands by preemption, entry or otherwise after the effective date of the Enabling Act, the absence of which from the Nevada Enabling Act had been a controlling factor in causing the Court in the Heydenfeldt Case to rule that this policy was continued in force and effect by the Nevada Enabling Act. The language used by Congress for this purpose was: "such land shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

This same policy was followed by Congress when Idaho was admitted on July 3, 1890, by the use of the same language.

This language is, of course, the identical language used in Wyoming's Enabling Act of July 10, 1890, for the same end and purpose.

It is important to note, however, that in the case of Wyoming it was not necessary for Congress to adopt a policy different from the policy put into effect in Wyoming territory by the school land reservation provision of Wyoming's Organic Act.

Wyoming is the only state where the policy of withholding the designated unsurveyed school lands from preemption and entry and reserving them for the schools was adopted by Congress in the Organic Act which preceded and looked to the State's Enabling Act.

The meaning, intent and purpose of the provision, "such land shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only," considered in the light of the former policy of making designated, unsurveyed school lands subject to preemption, entry and other disposition by the United States prior to survey, seems clear and certain from a consideration of the language itself. If, however, there is any doubt as to the policy which Congress intended to adopt in regard to Wyoming's designated unsurveyed school lands by the use of this language in Wyoming's Enabling Act, then this doubt is removed by the legislative history of this language as it was used in the said Enabling Act of February 22, 1889, under which Washington was admitted to the Union. This language first appeared as a part of Section 6 of said Enabling Act immediately following the "grant provisions." During the legislative history of this provision it was proposed to add thereto a provision which was to the effect that settlers upon the designated unsurveyed school lands at

the time of the effective date of the Enabling Act, or within a specified time thereafter, should have a preference right to buy a certain quantity of the school land upon which they had settled from the State at $6.00 per acre. Objection to this suggestion was made on the ground that if a provision of this character was added it would mean that all of the valuable and productive designated school land sections then unsurveyed would be acquired by settlers at a price which would cause serious loss to the corpus of the school land trust fund. It will be noted that the argument which was used to defeat such proposal was substantially the same argument which brought about the elimination from Wyoming's Organic Act of any reference to surveys and resulted in the reservation of the designated unsurveyed school lands from the effective date of Wyoming's Organic Act.[1]

It seems clear that under the policy adopted by Congress in dealing with the designated "place" school land grant to Wyoming, the words "otherwise disposed of" used in Section 4 of Wyoming's Enabling Act must be construed as referring to such of said lands as had been theretofore disposed of because any future disposition of said lands is prohibited by the express terms of Section 5 of the Act and the reservation of said lands to Wyoming for school purposes only. To construe the words "not otherwise disposed of" as looking to the future would be to nullify the prohibition against the preemption or entry of said lands and the congressional reservation of them on behalf of Wyoming for school purposes only.

It likewise seems clear that in construing the words "and such land shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United

[1] Data as to the legislative history of this language as used in Wyoming's Enabling Act with excerpts from Committee Reports will be found in Appendix III, at Pages 102 to 108.

States, whether surveyed or unsurveyed, but shall be reserved for school purposes only," it must be remembered that under the rule of law as established by this Court prior to the date of Wyoming's Enabling Act, this phrase only has significance when it is applied to unsurveyed school land sections. Under this rule legal title to the designated school land sections, which at the time of Wyoming's Enabling Act were situated within townships which had been surveyed by an accepted subdivisional survey, vested in Wyoming simultaneously with the enaction of Wyoming's Enabling Act. As to these surveyed designated school land sections, no provision was necessary in the statute withdrawing them from preemption and entry and no reservation of them for the purposes of the grant was necessary because legal title to these lands passed to Wyoming by operation of law forthwith upon the enaction of Wyoming's Enabling Act. Technically, therefore, the last seven lines of Section 5 were only applicable to the unsurveyed designated school land sections. It was these lands that, after Wyoming's Enabling Act took effect, the United States still held legal title to, and these were the only designated place school land sections that the United States had jurisdiction over after Wyoming's Enabling Act took effect.

The first eight lines of Section 5 of Wyoming's Enabling Act which end with a semi-colon are concerned with the agreement, stipulation, and obligation of the state in regard to the disposal of the school lands and the holding of the proceeds of disposal in trust, with the income to be used for the support of the schools. This portion of Section 5 is clearly intended to constitute an undertaking and agreement on the part of Wyoming as to the manner in which it will use the school lands granted to it by the United States. Following said semi-colon in line 9 of said Section 5, the subject-matter of the balance of this section is clearly

the stipulation and agreement on the part of the United States in regard to unsurveyed designated school land sections. Congress knew that by operation of law legal title to the designated school land sections, which had been surveyed at the time Wyoming's Enabling Act took effect, passed to Wyoming simultaneously with the enaction of its Enabling Act. Congress also knew that the school land reservation of Wyoming's Organic Act looked to a grant to the State of Wyoming of the unsurveyed school land sections, and, therefore, Congress, in order to carry into effect the policy, spirit, and meaning of the school land reservation provision of the Wyoming Organic Act, inserted as the concluding provision of Section 5 an agreement and stipulation on the part of the United States that the unsurveyed designated school land sections should not be subject to preemption or entry or any other disposition, but should be reserved on behalf of Wyoming for school purposes only.

Congress also knew that in the Heydenfeldt Case this court had ruled that, the absence of any provision in the Nevada Enabling Act limiting the power of disposal by the United States prior to survey, was indicative of an intent on the part of Congress to retain the power of disposal of the designated school land sections by preemption, entry, or otherwise, until there had been an accepted survey thereof. Congress, therefore, in order to take Wyoming out from under the Heydenfeldt Case, included as a part of Section 5 this stipulation on the part of the United States that said unsurveyed designated school land sections would not be disposed of by the United States through preemption or any type of entry, and then by way of a "clincher", followed with the provision that said unsurveyed designated school land sections "should be reserved for school purposes only."

By reason of the foregoing, it is perfectly clear that the Morrison Case should not control in the case at bar in the manner suggested by Plaintiff. Such case will not be overruled nor modified by the application of the construction and principles contended for herein by Wyoming which are supported by and in accordance with an established line of decisions of this Court.

6. *Discussion of Plaintiff's contentions based on Sections 4 and 5 of Wyoming's Enabling Act, Section 6 of the Act of August 9, 1888, and the Act of February 28, 1891.*

When the case was before The Master, the Plaintiff contended, in effect, that the reference in Section 4 of the Enabling Act to Section 6 of the Act of August 9, 1888, had the effect of "assimilating" Section 6 as a part of Section 4, with the result that the prohibitory and reservation provisions of Section 5 of the Enabling Act were nullified. A careful consideration of the applicable statutory provisions will demonstrate that there is no merit in this argument.

Sections 4 and 5 of the Wyoming Enabling Act provide:

> "Sec. 4. That sections numbered 16 and 36 in every township of said proposed state, and, where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said state for the support of common schools, such indemnity lands to be selected within said state in such manner as the legislature may provide, with the approval of the secretary of the interior; provided, that Section 6 of the Act of Congress of August 9, 1888, entitled 'An Act to authorize the leasing of the school and university lands in the Territory of Wyoming, and for

other purposes', shall apply to the school and university indemnity lands of the said state of Wyoming so far as applicable.

"Sec. 5. That all lands herein granted for educational purposes shall be disposed of only at public sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislature shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such land shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

Section 6 of the Act of August 9, 1888, (Chap. 819, 25 Stat. 393), referred to in the proviso of Section 4 of the Enabling Act, reads as follows:

"Sec. 6. That where lands in the sixteenth and thirty-sixth sections, in the Territory of Wyoming, are found upon survey to be in the occupancy, and covered by the improvements of an actual preemption or homestead settler, or where either of them are fractional in quantity, in whole or in part, or wanting because the townships are fractional or have been or shall hereafter be reserved for public purposes, or found to be mineral in character, other lands may be selected by an agent appointed by the governor of the Territory in lieu thereof, from the surveyed public lands within the territory not otherwise legally claimed or appropriated at the time of selection, in accordance with the principles of adjustment prescribed by section twenty-two hundred and seventy-six of the Revised Statutes of the United States, and upon a determination by the Interior Department that a portion of the smallest legal subdivision in a section numbered sixteen, or thirty-six, in Wyoming, is mineral land, such smallest legal subdivision shall be excepted from the reservation

for schools, and indemnity allowed for it in its entirety, and such subdivisions, or the portions of them remaining after segregation of the mineral lands or claims, shall be treated as other public lands of the United States."

It will be noted that the subject matter of the first ten lines of Section 4 of the Enabling Act ending with the word "schools" is the grant to the State of Sections 16 and 36 and lieu lands in the event said sections or any parts thereof have been sold or otherwise disposed of.

After the word "schools" in the tenth line of said Section 4, a comma appears and then it is provided "such indemnity lands to be selected within said state in such manner as the legislature may provide with the approval of the Secretary of the Interior;".

It is obvious that the subject matter of Section 4 down to the word "schools" in the tenth line is the primary grant of Sections 16 and 36 and indemnity lands in lieu thereof where said sections or any part thereof have been sold or disposed of. It is likewise obvious that the subject matter of the words of the statute following the comma appearing after said word "schools", is the method or manner of selecting the indemnity lands. In this regard the statute expressly provides "such indemnity lands to be selected within said state in such manner as the legislature may provide, with the approval of the Secretary of the Interior." It will be noted that down to this point in Section 4, Sections 16 and 36 of every township in the state have been granted together with indemnity lands in lieu of said Sections 16 and 36 if said sections or any part thereof have been sold or disposed of.

Down to this point, no express provision appears which gives to Wyoming the right to select lieu lands if upon survey it is found that a township is fractional and does

not contain a Section 16 or 36 or if it is found that a Section 16 or 36 is fractional so that it does not contain 640 acres.

It seems clear that the subject matter of the statute immediately preceding the "Provided" clause is the right to lieu lands. Under the authorities, this, in itself, would be sufficient to confine the proviso clause to the subject matter of the statute immediately preceding such proviso. Congress, however, was not content to leave the construction of the proviso clause to this rule of law and expressly stated that Section 6 of the Act of August 9, 1888, should only apply to the lieu lands so far as it was applicable and not in conflict with any of the express and specific provisions of the body of the statute.

Congress, by incorporating as a part of Section 4 that portion of Section 6 of the Act of August 9, 1888, which provided for the selection of lieu land, where a township was fractional and did not include a Section 16 or 36, or where said sections were fractional, covered a situation that was not provided for in the body of the section. Congress also by this reference provided that lieu land selections made by reason of said fractional townships or sections should be made in keeping with the method or procedure established by Section 2276 R. S. (43 U. S. C. A. Sec. 852).

This much of Section 6 of the Act of August 9, 1888, is applicable and not in conflict with the subsequent express and specific provision of Section 5 which provides "and such land shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

The contention of the United States is that by the reference in Section 4 to Section 6 of the Act of August 9, 1888, Section 4 must be construed as containing an express and

specific provision to the effect that the unsurveyed Sections 16 and 36 should be subject to preemption and homestead entry and any other type of disposition on the part of the United States.

We submit that this is a strained and untenable construction of the proviso of Section 4. The effect of that proviso was simply to adopt that part of Section 6 of the Act of August 9, 1888, that applied to the indemnity lands "of the said State of Wyoming so far as applicable." The effect was to provide how the indemnity lands should be selected in cases where the State was entitled to select indemnity lands. The proviso subtracted nothing from the grant and certainly subtracted nothing from Section 5 prohibiting preemption, homestead entries or other entries and creating immediately a reservation "for school purposes only."

As we have before pointed out, the indemnity or "lieu" provisions of Section 4 of the Wyoming Enabling Act, considered in connection with the provisions of Section 5, could apply and did apply only to the lands already disposed of, under the authority of Congress. These indemnity or "lieu" provisions had no application to *future* dispositions of these lands because Section 5, considered in connection with Section 4, effected an immediate prohibition of future disposition of these lands by preemption or any kind of entry under the land laws of the United States, and further provided that these lands should be reserved "for school purposes only." With future disposition prohibited, how could the in "lieu" or indemnity provisions of Section 6 be operative in respect to such disposition?

To construe this proviso and Section 6 to which it refers as meaning that the lands reserved for "school purposes only" and on which preemption and entry claims were prohibited should nevertheless be subject to such claims is to

nullify, not only the provisions prohibiting such preemption and entries, but also the provision creating Congressional reservation "for school purposes only," for the benefit of the people of the State of Wyoming. For that reason the suggested construction is obviously untenable.

It is also evident that if the theory of Plaintiff is adopted, then there exists in Section 4 of the statute an express and specific provision in direct and irreconcilable conflict with the above quoted portion of Section 5.

The provision of Section 5 to the effect that the unsurveyed Sections 16 and 36 shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, but shall be reserved for school purposes only, forms a part of the body of the Act and is the latest in order of position and arrangement and is therefore controlling as to any provision of Section 6 of the Act of August 9, 1888, which is in conflict thereto.

State v. *Welker*, 47 Ohio App. 42, 190 N. E. 150:

> "It is an elementary rule of statutory construction that statutes are to be construed so as to give them effect if possible, and that repeals by implication are never favored. Where there is a conflict between the express provisions of a statute incorporated in that statute by reference, the express provisions of the statute are to be given effect over conflicting provisions of the statute incorporated by reference, and the provisions of such incorporated statute are to be restricted to matters regarding which there is no conflict."

Reuter v. *Board of Sup'rs.*, 220 Cal. 314, 30 P. (2d) 417:

> "* * * In California Jurisprudence, vol. 23, p. 744, it is said: 'A proviso—the office of which is to explain, qualify or restrain the operation of a preceding provision—should be read in the light of the subject matter of the act, as well as in connection with the clause which it follows. As a general rule, a proviso

which is clearly repugnant to the body of the act will be ignored, though, in accordance with the settled rule, it is the duty of the court to reconcile a proviso, when reconciliation is practicable, with an apparently conflicting provision so as to carry into effect the intention of the lawmakers as it appears from the whole act and from contemporaneous legislation.' 'It would seem that the language there used could be construed as operative without nullifying these express provisions; but if this be not so, and the two provisions are contradictory, it is the proviso and not the principal part of the statute which must give way.' * * *"

United States v. *Daniels*, 279 F. 844, 849 (2nd Cir.):

"We do not think that this apparent conflict is one in reality. It is a cardinal rule of construction that effect is to be given, if possible, to every word, clause, and sentence of the statute. * * * It is the duty of the court so far as practicable to reconcile the different provisions, so as to make them consistent and harmonious, and to give a sensible and intelligent effect to each. * * * In the consideration of irreconcilable conflicting provisions, if both were enacted the same time, the last in order or arrangement controls. *Hall* v. *Equator M. & S. Co.*, Fed. Cas. No. 5,931; *In re Richards*, 96 Fed. 935, 939, 37 C. C. A. 634; *In re Tune* (D. C.) 115 Fed. 906, 911; *United States* v. *Jackson*, 143 Fed. 783, 75 C. C. A. 41; *Howard* v. *Bangor & A. R. Co.*, 86 Me. 387, 29 Atl. 1101; *State* v. *Public Service Commission*, 101 Wash. 601, 172 Pac. 890. And one of Puffendorf's rules of construction is that:

" 'When we meet with a seeming repugnancy in the terms, conjectures are necessary to work out the genuine sense, by reconciling it, if possible, to those terms that seem to be repugnant. But if there be a clear, evident repugnancy, the latter vacates the former.' "

Plaintiff's Brief on this point seems to indicate a loss of faith in the theory that the provisions of the proviso of Section 4, nullify the crucial language of Section 5 and seems to disclose an increased attachment on the part of

Plaintiff to the contention that even though the proviso of Section 4 could not nullify the subsequent provisions of Section 5, nevertheless, the provisions of Section 5 withdrawing the unsurveyed designated school land sections from preemption and entry, were within seven months after their enaction repealed by the Act of February 29, 1891, and said unsurveyed school lands were thereupon thrown open to preemption and entry.

Putting aside for the time being, the legal implications inherent in the fact that Wyoming's Enabling Act was not ordinary "run of the mill" legislation, but on the other hand constituted a compact between sovereign states, we suggest that the weakness of this "second string" to Plaintiff's bow, is apparent.

Plaintiff, in the conception of this theory carefully ignored the vitally significant fact that Section 5 not only contains a provision withdrawing the unsurveyed designated school sections from preemption and entry but also contains a provision which in plain, direct and positive terms, appropriated said unsurveyed school land to Wyoming's school land grant by a reservation of them limited to the use and purpose of the grant, *i.e.*, for school purposes only.

Beginning with *Wilcox* v. *Jackson*, 13 Peters 498, this Court, in the long line of cases heretofore discussed in a preceding division of this brief, has clearly and emphatically held, "whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes separated from the mass of public lands and that no subsequent law would be construed to embrace it. Every tract set apart for some special use is reserved to the Government to enable it to enforce that use, and there is no difference in this respect whether it be appropriated for Indian occupancy or for other purposes. There is an equal obligation resting

on the Government to see that neither class of reservations is diverted from the uses to which it was assigned."

Plaintiff seeks to gloss over and avoid the difficulties presented by the fact that the provisions of Section 5 of Wyoming's Enabling Act constitute a stipulation of the compact between the United States and Wyoming under which Wyoming entered into the Union by off-handedly treating Wyoming's Enabling Act as ordinary public land legislation subject to the changing views and even the whim or caprice of each succeeding Congress.

It is easy to understand why no authority for this novel and astounding proposition is cited or urged. Since as early as *Cooper* v. *Roberts*, 18 How. 173, and *Beecher* v. *Wetherby*, 95 U. S. 517, this Court has held that the terms, provisions and stipulations of an Enabling Act under which a State comes into the Union, form a part of a solemn compact between the United States and the State, and that therefore, the terms, stipulations, conditions and provisions of an Enabling Act may not be altered or changed except upon the formal consent of both of the sovereign parties to the compact evidenced and given in the manner required by law.

II.

On December 20, 1892, Upon the Acceptance by the Commissioner of the General Land Office of the Coleman Survey of Township 58, the Exterior Boundaries and Corners of Said Township Were Fixed and Established and the Exterior Boundaries, Corners and Quarter Corners Were Marked So That Wyoming, Under the Provisions of Its Enabling Act, Became Vested in Equity With an Indefeasible Right, Title and Interest in School Section 36 Which Could Not Thereafter Be Divested by Any Act on the Part of the United States.

Attached to this brief as Appendix IV, are summaries of factual data and excerpts from documentary evidence, including excerpts from the Coleman Survey field notes and plats.

An exhaustive analysis of the mass of documentary evidence which directly or indirectly pertains to the Coleman Survey is not necessary because it has been conceded from the outset of this case that the Coleman Survey of the boundaries of Township 58 was accepted by the Commissioner of the General Land Office on December 20, 1892, as having been made according to the applicable law and regulation and that thereby and thereupon the exterior corners and boundaries of Township 58 were fixed and established and permanent corners were established along the East, West and South boundaries of said Township 58 at every half mile.

It is Wyoming's basic contention on this phase of its claim to Section 36, that this accepted United States survey of the boundaries of Township 58, in equity established the existence of Section 36 within said Township 58 and identified and located it within the rule developed and applied by this Court in the Railroad land grant cases.

Even under Plaintiff's theory of this case, it must be conceded that Wyoming's Enabling Act created in its favor at least an inchoate or floating interest or right in respect to the then designated unsurveyed school land sections.

Under this theory, said inchoate or "floating" right or interest did not attach to or become a vested equitable right, title or interest in any specific unsurveyed Section 16 or 36 until said lands were identified or became susceptible of identification through an accepted survey of at least the boundaries of the township in which said lands were situated.

It is the contention of the United States that this inchoate or "floating" right or interest had no significance at law or in equity until the acceptance of subdivisional township surveys which created said school land sections by establishing all of their corners and lines.

It is Wyoming's contention that the acceptance of the Coleman Survey of the corners and boundaries of the fractional Township 58 in question was sufficient in equity to identify or make susceptible of identification Section 36 and that thereupon Section 36 was appropriated to Wyoming's school land grant and reservation and was not thereafter subject to any other disposition by the United States.

The equitable rule or principle upon which this contention is founded is most frequently recognized, discussed and applied by this Court in connection with the construction and application of the provision of the Railroad land grant statutes in regard to the rights which the railroads acquired in the designated unsurveyed sections situated within the exterior limits or lines of the primary grant.

The earlier Railroad land grant statutes provided that, after the general route of the proposed railroad had been filed, the "odd sections of land hereby granted shall not be liable to sale or entry or preemption *before or after*

they are surveyed." It was uniformly held that this language constituted a withdrawal and appropriation of the unsurveyed odd numbered sections, within the limits of the primary grant, to the subject of the grant and that thereafter the United States could not make any other disposition of the said land. See *Southern Pac. R. Co.* v. *Orton,* 32 F. 457, *supra; Wood* v. *Burlington & Missouri River R.R. Co.,* 14 Otto 329, *supra;* and *St. Paul & P.R. Co.* v. *Northern Pac. R. Co.,* 139 U. S. 1, *supra.*

Most of the later Railroad land grant statutes provide that, during the time between the filing of the general route of the railroad and the establishment of the definite route of the road, the odd numbered sections within the limits of the primary grant are open to settlement or entry, but that upon the establishment of the definite route said odd numbered sections shall not be subject to preemption or homestead entry.

The Railroad land grant statutes are not uniform as to their terms and provisions and the decisions construing said grants have, from time to time, been modified. An analysis of these decisions, however, seems clearly to disclose that the interest or right of the railroad, in the unsurveyed odd numbered sections within the limits of the primary grant, was an inchoate or "floating" right or interest prior to the establishment of the definite route or location of the railroad, but that upon the establishment of the definite location of the road, the exterior boundaries or lines of the primary grant were, as a consequence thereof, fixed and established and the odd numbered, unsurveyed sections within said exterior lines became susceptible of identification, and thereupon the interest or right of the railroad thereto attached, and said lands, whether surveyed or unsurveyed, were not thereafter subject to any other disposition by the United States because they were, in equity, considered as reserved and appropriated to the

grant, even though there were no township or subdivisional surveys of said lands.

It also appears from analysis of the Railroad land grant decisions that the unsurveyed odd numbered sections, within the exterior boundaries of the primary grant, were held, as identified, or susceptible of identification, because their location on the ground could be determined with mathematical certainty by protraction.

The case of *Grinnell* v. *Chicago Rock Island & Pacific R.R. Co.*, 103 U. S. 739, is of peculiar and outstanding significance, because, in this case, this Court announced the basis for its rule that the interest or right of the railroad attaches, to the unsurveyed primary grant railroad lands, at the time the definite route of the road is established. The basis for this rule, as it is announced in the Grinnell Case, is that upon the establishment of the definite location of the road a surveyor, or the officers of the Land Department, could protract the line of the route of the railroad on the maps of the public lands within the exterior lines of the primary grant and thus identify the odd numbered sections within the limits of the primary grant. On this proposition, the Court said:

> "The grant under the Act of 1856 was, as has been often said, a grant *in praesenti*, and though exactly what this means has been the subject of much controversy, we think its ascertainment is not difficult. The only doubtful element of the problem is the location of the road, which, by the terms of these grants, is necessary to identify the sections granted on each side of it. Whenever that is done, so that a surveyor or the officers of the land department can protract the line of the route on the maps of the public lands within the limit of the grants, the identity of the lands granted is mathematically ascertained, and the title relates back to the date of the grant.
>
> "So far as lands are found in place when this is done, not coming within the exceptions as sold or held

under preemption, the title, or at least the right to this land in place, is at once vested in the State or in the company to which the State has granted it, and the means of ascertaining precisely what lands have passed by the grant is to be found in the map of the line of the road, which is filed in the General Land Office under the provisions of the statute. * * *" (Italics supplied.)

In *Cedar Rapids & M. R.R. Co.* v. *Herring,* 110 U. S. 27, the Court said:

"It is obvious, however, that the right to these odd sections, and the right to others in lieu of such odd sections as have been previously disposed of, depend upon very different circumstances, and it is not easy to see how rights can be vested in any particular section or sections of the latter class until it is ascertained how many of the original odd-numbered sections are thus lost, and until the grantee has exercised his right of selection. These latter, unlike the odd numbers within the six-mile limit, are not ascertained and made specific by the protraction of the established line through the maps of the public lands. They are not and cannot be made specific until the grantee's right of selection has been exercised."

In *Van Wyck* v. *Knevals,* 106 U. S. 360, the Court said:

"* * * The difficulty in immediately giving full operation to it arises from the fact that the sections designated as granted are incapable of identification until the route of the road is 'definitely fixed'. When that route is thus established the grant takes effect upon the sections by relation as of the date of the act of congress. In that sense we say that the grant is one *in praesenti.* * * * It matters not, so far as subsequent settlers are concerned, in what manner the title, which has passed out of the United States, is transferred to the company from the state. When the route of the road is 'definitely fixed' no parties can subsequently acquire a pre-emption right to any portion of the lands covered by the grant. The right of the state and of

the company is thenceforth perfect as against subsequent claimants under the United States." (Italics supplied.)

"* * * No further action is required of the company to establish the route. It then becomes the duty of the secretary to withdraw the lands granted from market. But if he should neglect this duty, the neglect would not impair the rights of the company, however prejudicial it might prove to others. Its rights are not made dependent upon the issue of the secretary's order, or upon notice of the withdrawal being given to the local land-officers. Congress, which possesses the absolute power of alienation of the public lands, has prescribed the period at which other parties than the grantee named shall have the privilege of acquiring a right to portions of the land specified, and neither the secretary nor any other officer of the land department can extend the period by requiring something to be done subsequently, and until done, continuing the right of parties to settle on the lands as previously. * * *".

In *Wisconsin Cent. R. Co.* v. *Price County*, 133 U. S. 496, the Court said:

"* * * The title conferred by the grant was necessarily an imperfect one, because, until the lands were identified by the definite location of the road, it could not be known what specific lands would be embraced in the sections named. The grant was, therefore, until such location, a float. But when the route of the road was definitely fixed, the sections granted became susceptible of identification, and the title attached to them and took effect as of the date of the grant, so as to cut off all intervening claims. * * * The road having been built as early as June, 1887, and supplied, as required, with appurtenances specified, the company was entitled to have the restrictions upon the use of the land released. It had then, to the eleven 40-acre parcels which were capable of identification, *an indefeasible right or title; it matters not which term be used.* * * *" (Emphasis added.)

In *Santa Fe Pac. R.R. Co.* v. *Lane*, 244 U. S. 492, 34 years had elapsed between the time of the definite location of the railroad and the subdivisional survey. During this time, and while the townships involved, with their odd numbered sections, were unsurveyed, said unsurveyed land was included in a forest reserve. This Court, however, held that the right of the railroad in said unsurveyed odd numbered sections had vested at the time the definite location of the road was established, and said odd numbered unsurveyed sections thereby became capable of identification and that thereupon said unsurveyed land was appropriated to the grant and was not subject to any other disposition by the United States. The Court said in part:

> "* * * There are millions of acres of unsurveyed lands within the primary limits of the unforfeited portion of the grant of 1866. See Senate Report, *supra*. *The plaintiff is entitled to many of the odd-numbered sections within the unsurveyed areas.* * * *" (Emphasis added.)

Obviously, these townships and their odd numbered sections had not been created by an accepted subdivisional survey of all of their lines at the time the equitable right or title of the railroad in said unsurveyed odd numbered sections was vested by the establishment of the definite location of the road. The establishment of the definite location of the road fixed, without even so much as a township survey, the exterior lines of the primary grant, and thereupon said unsurveyed townships, with their odd numbered sections, became susceptible of identification by protraction; and, in equity this was sufficient to vest an indefeasible right in the railroad ultimately to acquire legal title to said odd numbered sections when all of the lines of said sections might be established by an accepted subdivisional survey of the townships in which they were situated.

In *United States* v. *Northern Pac. Ry. Co.*, 311 U. S. 317, the Court said:

> "The ultimate obligation of the Government in respect of the indemnity lands is on the same plane as that respecting the lands in place. The only difference is in the mode of identification. Those in place are identified by filing the map of definite location, and the indemnity lands by selections made in lieu of losses in the place limits."

The provision of the statutory contract between the United States and the railroad relative to the right of the railroad, in regard to the unsurveyed odd numbered sections within the boundaries of the primary grant, is in substance similar to Wyoming's Enabling Act which provides that Sections 16 and 36, whether surveyed or unsurveyed, shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, but shall be reserved for school purposes only.

If Wyoming is placed on a par with the railroads, then it seems necessarily to follow that when Township 58 was created as a Congressional township by the acceptance of the Coleman Survey, which established its exterior corners and boundaries, and also corners along the East, West and South boundaries at every one-half mile, then under the equitable rule of this Court of identification through the protraction of established exterior boundaries, Section 36 was identified or became easily susceptible of identification and thereupon Wyoming's inchoate and floating right became a vested and indefeasible equitable right, title or interest in and to Section 36, and an obligation was created on the part of the United States under and by reason of which Section 36 was irrevocably appropriated to Wyoming's school land grant and reservation and was not thereafter subject to any other disposition, but stood, with legal title in the United States, reserved for a single and specified

use, purpose and trust, *i. e.*, on behalf of Wyoming for school purposes only.

Under Plaintiff's theory, a section in a township cannot be identified or become capable of identification except through an accepted United States Subdivisional Field Survey which establishes all of the lines of said section, thereby, from a technical standpoint, creating said section.

Under the decisions of this Court, it seems clear that the rule contended for by Plaintiff has no application in a court of equity where equitable obligations, rights and interests are involved rather than issues which pertain to technical legal title.

Not only have the courts held that a township or section therein may be in equity identified or made capable of identification by methods other than an accepted subdivisional field survey of all lines, but Congress itself has authorized and provided for the identification of entire townships by protraction or otherwise prior to the extension of the subdivisional field surveys to said lands.

The Act of February 28, 1891 (43 U. S. C. A. Sec. 681), provides in part:

> "* * * And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of Sections 16 and 36 therein; * * *"

This statute not only provides that entire townships may be identified by protraction, but also provides that the existence or non-existence, within the exterior lines of such protracted townships, of Section 16 and 36 shall be determined as the basis for lieu selections.

Congress also by statute authorized railroads to make lieu selections of unsurveyed lands in which the lands selected should be described with reasonable certainty. The Northern Pacific Railroad Company made a lieu selection under this statute in which the land was described as being "Section 20 when surveyed". The 9th Circuit Court of Appeals in the case of *West* v. *Edward Rutledge Timber Co.*, 221 F. 30, in holding that such description was sufficient, said in part:

> "• • • Every one is presumed to know the method by which government surveys are made, and what is meant by township and range, and what by section and quarter section, or other legal subdivisions, and the relation of one township to another and of one section with its subdivisions to another. So that, for instance, if township 2 N. is surveyed, and a tract is described as section 1 in township 1 N., there could be no question that the tract was designated with a reasonable degree of certainty. It would be the section immediately south of surveyed section 36 in township 2 N. It is a maxim that that is certain which can be made certain, and its application would make the result perfectly manifest. Section 1 in that case would be tied directly to fixed monuments, to wit, the southeast corner of township 2, and the southeast and southwest corners of section 36 in that township. • • •
>
> "A description by legal subdivision is a perfectly intelligible designation of a tract of land, so it must follow that a description which will be a legal subdivision when surveyed, if lying adjoining a subdivision already surveyed, is also a perfectly intelligible description; and any one at all familiar with the government surveys could not be mistaken as to what was meant by the designation, and would be ready to locate the premises. Such a description would be absolutely good in a contract or deed, and would convey title."

This decision was affirmed by this Court in *West* v. *Edward Rutledge Timber Co.*, 244 U. S. 90.

Plaintiff contends that the rule as to the identification of unsurveyed lands situated within established exterior boundaries by protraction or the actual running on the ground of the interior lines, which has from early days prevailed in this Court, in regard to unsurveyed railroad grant lands, is not applicable to unsurveyed school grant lands. Plaintiff seems to feel that there is a difference in the background of the grants. This seems to be a distinction without a difference, because, in equity, rights predicated upon a trust or in good conscience have equal dignity regardless of the varying facts or circumstances which bind the conscience or create the trust. Upon analysis, the basic reason for this contention seems to be that never before, in any reported case involving the question of the time of the establishment of an indefeasible equitable right to school lands in the State, has the Court been presented with a situation where the township in which said school lands were situated had been established by an accepted survey of its boundaries years prior to an accepted interior subdivisional survey thereof. Under the applicable statute (43 U. S. C. A. Sec. 751), a township may be created and established by an accepted survey of its exterior boundaries years prior to an accepted subdivisional survey of the lands within the established boundaries of said township.

When Township 58 was surveyed by Coleman and his survey accepted by the Commissioner of the General Land Office, December 20, 1892, the State of Wyoming then and there obtained the equitable right, title and interest in and to said Section 36 and the same was thereupon and thereby withdrawn from any and all disposition of every kind and character by the United States and "reserved for school purposes only." Therefore, the Presidential Withdrawal of December 6, 1915, was null and void and of no force or effect as to this Section 36.

Upon the acceptance by the Commissioner of the General

Land Office on December 20, 1892, of the Coleman Survey of Township 58, it is obvious that the duly authorized officials of the United States and the State of Wyoming, acting within their authority, considered and treated this accepted survey of Township 58 as sufficient to establish the existence and location of Section 36 within said township. This naturally led Wyoming to assume that further activity on its part to bring about an accepted subdivisional survey of Township 58 was not necessary. Under this phase of the situation, as it is presented by the record and the Master's Finding of Fact Numbered 10, the rules and principles of law which affirmatively support Wyoming's claim to Section 36 are supplemented and emphasized by the presence of all of the elements of an equitable estoppel. *United States* v. *Denver & R. G. & W. R. Co.*, 160 F. (2d) 374 (8th Cir.); *New Mexico* v. *Texas*, 275 U. S. 279; *Tubbs* v. *Wilhoit*, 138 U. S. 134; *Dayton Airplane Co.* v. *United States*, 21 F. (2d) 673; *State of Iowa* v. *Carr*, 191 F. 257 (8th Cir., Judge Sanborn); *Knapp-Monarch Co.* v. *Commissioner of Int. Rev.*, 139 F. (2d) 863; *Ritter* v. *United States*, 19 F. (2d) 251 (D. C. Penn.); *Shooters Island S. Co.* v. *Standard Shipbuilding Corp.*, 293 F. 706, 715 (3rd Cir.); *United States* v. *Midway Northern Oil Co.*, 323 F. 619 (D. C. Cal.); *Pan-American Petroleum & Transport Co.* v. *United States*, 273 U. S. 456.

Plaintiff, by the line of authorities which is to the effect that an accepted subdivisional survey is necessary to the creation of the sections of a township, seeks to avoid the application in this case of the equitable rule of susceptibility of identification which becomes operative upon the establishment of exterior boundaries.

In the instant case the controlling question presented by this division of Defendants' brief does not concern the essential elements of a legal title. The question of paramount significance here is concerned with the circumstances

which, in equity, are deemed sufficient to create and vest in Wyoming an indefeasible, equitable right ultimately to acquire legal title to lands which are admittedly identified or susceptible of identification because they are situated within the exterior boundaries of a township established by an accepted United States survey thereof.

The question under discussion is therefore substantially identical to the question which was presented and ruled upon by this Court in the Railroad land grant cases heretofore referred to.

The cases relied upon by Plaintiff go no further than Plaintiff's basic contention which seems to be that legal title to a Section 36 could not vest in Wyoming until the Commissioner of the General Land Office had approved an official survey of all the lines of the section.

Plaintiff has presented no case in which this Court or any other court has considered the question of the sufficiency in equity of the identification of school lands under a grant and reservation in an Enabling Act similar to Wyoming's, where the school land involved was situated within the boundaries of a township which had been established by an accepted United States Survey.

As to this phase of Wyoming's claim to Section 36, the paramount and significant circumstance which distinguishes this case from any and all of the cases cited and relied upon by Plaintiff, is the fact that in 1892, at the request of Wyoming, for the purpose of selecting its quantity school lands and of identifying its "place" school lands, the United States made a survey of the boundaries of Township 58 and said survey was accepted by the Commissioner of the General Land Office. It is this accepted United States Survey of the boundaries of Township 58, plus the language of Wyoming's Enabling Act, which provides that the designated school land sections

granted to Wyoming "shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only", which presents to the Court in this case, a situation which, as far as school land grants and reservations are concerned, is admittedly unique. We submit, however, that it is a situation which is strikingly analogous to the situation presented to this Court in the Railroad land grant cases where the language of the early Railroad land grant statutes was substantially similar to the language of Wyoming's Enabling Act, above quoted, and where as here, unsurveyed lands became susceptible of identification by the establishment of exterior boundaries of a large tract of land within which the unsurveyed lands in question were situated.

It is, of course, Wyoming's contention that the wording of the school land grant of its Enabling Act was intended by Congress to vest in Wyoming an equitable right to the designated unsurveyed school sections and that this right was not dependent upon a survey of any type or character. This is unquestionably the result which Congress intended should be brought about by the school land reservation of Wyoming's Organic Act which looked to said grant.

Wyoming, however, under the circumstances presented in this case, is not committed to a claim to Section 36 predicated alone upon the language of its Enabling Act, because it is not essential in this case that it be determined as a separate, distinct and controlling proposition of law that the wording of Wyoming's Enabling Act created a vested, equitable right in Wyoming ultimately to acquire legal title to every unsurveyed Section 16 or 36 within Wyoming, and not disposed of at the date of its Enabling Act, for in this case we not only have the language of Wyoming's Enabling Act which is substantially similar to the wording of the early Railroad land grant statutes, but we

also have an accepted United States survey of the exterior boundaries of Township 58. Under the established rule of this Court, this was sufficient to identify Section 36 or make the same susceptible of identification, and even though it be assumed that theretofore Wyoming's right to Section 36 was inchoate and unvested, such inchoate right became immediately, upon the acceptance of the survey of the exterior boundaries of Township 58, a vested indefeasible equitable right or title in and to Section 36, under which Section 36 thereafter stood reserved to Wyoming for school purposes only, with legal title to vest upon the acceptance of a subdivisional survey of Township 58.

III.

The Legal Title to Section 36 Vested in Wyoming on July 27, 1916, When the Commissioner of the General Land Office Accepted the Davis Subdivisional Survey of Township 58.

Plaintiff alleged and proved that on July 27, 1916, a subdivisional field survey of Township 58 was accepted by the Commissioner of the General Land Office.

Thereupon, Wyoming's theretofore indefeasible equitable right or title to Section 36 became a full and complete legal title. *United States* v. *Morrison*, 240 U. S. 192; *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 160; *United States* v. *Montana L. & M. Co.*, 196 U. S. 573. This legal title related back to the time of the vesting in Wyoming of its equitable right, title and interest in said Section 36. *Tubbs* v. *Wilhoit*, 183 U. S. 134, and *Work, Secretary*, v. *Louisiana*, 269 U. S. 250.

IV.

Wyoming Was and Is Entitled to a Finding of Fact and a Conclusion of Law to the Effect That Section 36 Was Not "Known Mineral Land" on or Prior to December 20, 1892.

Plaintiff had the burden of proof on all of the issues involved in its asserted title, including Plaintiff's allegation and contention that the land involved was known mineral land at the vital time.

44 Am. Jur., p. 67:

> "The complainant in an action to quiet title, to remove a cloud thereon, or to determine an adverse claim, has the burden of proof as to all issues arising upon the essential allegations of the complaint. He must prove title in himself if the answer denies his title or if the defendant claims title adversely. He must also assume the burden of showing compliance with conditions precedent to his right to relief. * * *"

It is elementary that if a plaintiff fails to introduce evidence in support of an issue made up by the pleadings, upon which plaintiff has the burden of proof, then the defendant is entitled to a finding against the plaintiff upon said issue.

Dillon Implement Co. v. *Cleaveland*, 32 Utah 1, 88 P. 670, 672:

> "* * * If the evidence was insufficient, or if there was no evidence in their support, the findings of fact should have been against the party upon whom was the burden of proof. *Golson* v. *Dunlap*, 73 Cal. 161, 14 Pac. 576."

Arizona Commercial Mining Co. v. *Iron Cap Copper Co.*, 29 Arizona 23, 239 P. 290, 294:

> "Second, where no evidence is introduced in regard to an issue, or the evidence introduced is insufficient

to support it, the finding thereon should be against the party having the burden of proof, and an omission of the findings to cover a particular fact or issue is to be deemed a finding on that fact or issue against the party having the burden of proof. 38 Cyc. 1985."

AS TO THE ACCOUNTING PHASE OF THE CASE IN THE EVENT IT SHOULD BECOME OPERATIVE.

1. *Plaintiff concedes that The Master correctly disposed of all accounting issues and these questions are settled in the event the Court should determine the title issue in favor of Plaintiff and should also confirm the disposition made by The Master of the question of Defendants' good faith. If the Court finds that the record does not support the Finding of The Master as to the Defendants' good faith, the case should be referred back to The Master for further hearing on this point.*

If the judgment in this case is for Wyoming on either or both of its contentions as to title, then there is no accounting phase of the case for consideration.

As we understand Plaintiff's brief (p. 42), Plaintiff concedes that The Master correctly disposed of all accounting questions and matters, excepting royalties, if Defendants acted in good faith.

Plaintiff, however, contends that The Master erred in his ruling that the good faith of Defendants was admitted by Plaintiff's Complaint.

It therefore appears that all accounting questions, except the one concerning royalties, are settled in this case in the event the Court should determine the title issue in favor of Plaintiff and should also confirm and approve the disposition made by The Master on the question of Defendants' good faith.

We submit that The Master correctly disposed of this matter for the reasons set forth in his Report at pages 24 to 37. (R. 449-457.)

Plaintiff, by its Complaint, in substance and effect alleged that Wyoming and its lessee, The Ohio Oil Company, entered upon and occupied the lands in question under color of title. This, plus the absence of any allegation of bad faith, was, as The Master correctly ruled, an admission or concession by the Plaintiff of the good faith of the Defendants.

Searl v. *School-Dist. No. 2*, 133 U. S. 553, 10 S. Ct. 335, 337:

> "* * * As remarked by Beckwith, J., in *McCagg* v. *Heacock*, 34 Ill. 476, 479: 'The good faith required by the statute, in the creation or acquisition of color of title, is a freedom from design to defraud the person having the better title;' and 'the knowledge of an adverse claim to or lien upon property does not, of itself, indicate bad faith in a purchaser, and is not even evidence of it, unless accompanied by some improper means to defeat such claim or lien.' "

Apart from any question of pleading or trial procedure, the record in this case contains ample proof to support The Master's Findings of the good faith of the Defendants even though he refused the evidence offered by the Plaintiff.

The applicable terms and provisions of Wyoming's Organic Act; the applicable terms and provisions of Wyoming's Enabling Act; the applicable proceedings of Wyoming's Constitutional Convention and the applicable provisions of Wyoming's Constitution; the request of Wyoming for a survey and the acceptance thereof by the Commissioner of the General Land Office, December 20, 1892; the existence in the local United States Land Office of a plat of Township 58 showing Section 36 marked as "School Land" (R. 117, 118); the public leasing of said Section 36 by the State of Wyoming for oil and gas; the

continuous, peaceful, uninterrupted and actual possession by Defendants since 1917, and their open and well known development and operation of said lands for oil and gas, all constitute a background in this case which, in and of itself, necessitates the elimination of any question of bad faith and abundantly supports The Master's Ruling that "The Ohio Oil Company is there (in possession) under a claim of right and is not a willful trespasser, and it is not necessary for The Ohio Oil Company [fol. 244] or the State of Wyoming to offer any proof on that." (R. 141.)

On pages 52-57 of Plaintiff's Brief appears a discussion of certain documents offered by Plaintiff on the question of good faith, which were rejected by The Master. At the conclusion of this discussion of these rejected documents, it is asserted that, because of inferences which counsel draw from some of these documents, plus the fact that the Ohio did not introduce evidence on a matter which The Master had ruled was not in issue, the Ohio should be held to be a bad faith trespasser and liable for the value of the full production.

It is difficult to understand why such a shockingly unfair proposition should be advanced by counsel. There is, however, no difficulty in establishing its obvious invalidity as a procedural proposition. This has been done as well or better than we could do it by Plaintiff's counsel in their Opening Brief before The Master on page 47, where it is said:

> "If the Supreme Court holds for the Government on the title issue the accounting issue will be reached. If the Court adopts the Master's view of the law on the issue of wilful trespass the case will be concluded. If the Court agrees with the Government's view of the wilful trespass issue, it is doubtful that a final decree could be entered since the record does not present the issue of wilful trespass on the merits.
>
> "The Government submits that on the present record on the issue of damages there is a reasonable possibility that the Supreme Court could not dispose of the

case on the first presentation. Consideration should therefore be given to reopening this case for the purpose of formulating a full record which will permit final disposition of the case whether the Court adopts the Master's view or the Government's view of the law with respect to wilful trespass."

We submit that if the Court finds in favor of Plaintiff on the title and also finds that The Master erred in ruling that good faith was not an issue in this case and that The Master's Finding of good faith of Defendants is not supported by the record, then this case should go back to The Master for disposition of this question in keeping with the directions of the Court.

2. *The Master properly refused to recommend a joint and several judgment against the Defendants for the royalties paid Wyoming because the existing deficit of $64,479.74 exceeds the royalty payments by $47,173.44.*

In The Master's Finding of Fact No. 13, he shows that the Defendant The Ohio Oil Company received, as gross proceeds from the development and operation of Section 36, the total sum of $168,317.53, and that it had made a total expenditure therefor in the amount of $232,797.27, including royalty payments made to Defendant the State of Wyoming, amounting to $17,306.30. Obviously the operation shows a deficit of $64,479.74, including said royalty payments. This sum exceeds the amount paid by Defendant The Ohio Oil Company to Defendant the State of Wyoming by $47,173.44.

The Master reached a proper conclusion when he refused to recommend a joint and several judgment, against Defendants for any royalties paid by Ohio to Wyoming, until it appeared, upon a future accounting, that the Ohio had received income in an amount in excess of its production costs as allowed by The Master, plus the amount paid by it

in royalties to the State; for, until this point is reached, The Ohio Oil Company will not have recouped its total costs; such a judgment would necessarily inflict an additional loss upon the Ohio by reason of its development and operation of said lands in good faith.

Conclusion.

We respectfully submit that The Special Master's Findings of Fact and Conclusions of Law should be modified and changed to conform to the Defendants' Exceptions thereto, and that a decree pursuant to and in keeping with said modified Findings of Fact and Conclusions of Law be entered dismissing the Plaintiff's Complaint and quieting Wyoming's title to Section 36, and allowing Defendants their costs and disbursements herein.

Respectfully submitted,

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APPENDIX I.

Pertinent Provisions of Organic Acts of Several of the States in Chronological Order.

1848—Aug. 14; **Oregon** (9 Stat. at L. 323):

Section 20. "When the lands in the said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same is hereby, reserved for the purpose of being applied to schools in said territory, and in the states and territories hereafter to be erected out of the same."

1849—Mar. 3; **Minnesota** (9 Stat. at L. 403):

Section 18. (Identical to Section 20 of the Oregon Organic Act.)

1850—Sept. 9; **New Mexico** (9 Stat. at L. 446):

Section 15. (Identical to Section 20 of the Oregon Organic Act.)

—Sept. 9; **Utah** (9 Stat. at L. 453):

Section 15. (Identical to Section 20 of the Oregon Organic Act.)

1853—Mar. 2; **Washington** (10 Stat. at L. 172):

Section 20. "And be it further enacted, That when the lands in said Territory shall be surveyed under the direction of the Government of the United States preparatory to bringing the same into market or otherwise disposing thereof, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to common schools in said Territory. And in all cases where said sections sixteen and thirty-six, or either or any of them, shall be occupied by actual settlers prior to survey thereof, the County Commissioners of the counties in which said sections so occu-

pied as aforesaid are situated be, and they are hereby authorized to locate other lands to an equal amount in sections, or fractional sections, as the case may be, within their respective counties, in lieu of said sections so occupied as aforesaid."

1854—May 30; **Nebraska** (10 Stat. at L. 277):

Section 16. (Identical to Section 20 of the Oregon Organic Act.)

—May 30; **Kansas** (10 Stat. at L. 277):

Section 34. (Identical to Section 20 of the Oregon Organic Act.)

1861—Feb. 28; **Colorado** (12 Stat. at L. 172):

Section 14. (Identical to Section 20 of the Oregon Organic Act, except the words "and territories" were deleted.)

—Mar. 2; **Dakota** (12 Stat. at L. 239):

Section 14. (Identical to Section 20 of the Oregon Organic Act, except the words "and territories" were deleted.)

Note: This Act is the Organic Act of the States of North Dakota and South Dakota.

—Mar. 2; **Nevada** (12 Stat. at L. 209):

Section 14. (Identical to Section 20 of the Oregon Organic Act, except the words "and territories" were deleted.)

1863—Mar. 3; **Idaho** (12 Stat. at L. 808):

Section 14. (Identical to Section 20 of the Oregon Organic Act.)

1864—May 26; **Montana** (13 Stat. at L. 85):

Section 14. (Identical to Section 20 of the Oregon Organic Act.)

1868—July 25; **Wyoming** (15 Stat. at L. 178):

Section 14. "That sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby reserved for the purpose of being applied to public schools in the state or states hereafter to be erected out of the same."

APPENDIX II.

Grants by Enabling or Other Acts of School Lands to Several of the States in Chronological Order, Prior and Subsequent to the Decision by the United States Supreme Court in the Case of Heydenfeldt v. Daney Gold, etc., Co., 93 U. S. 634.

1853—Mar. 3; **California** (10 Stat. at L. 246):

Sec. 6. "* * * That all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, which shall be and hereby are granted to the State for the purposes of public schools in each township, and with the exception of lands appropriated under the authority of this act, or reserved by competent authority, and excepting also the lands claimed under any foreign grant or title and the mineral lands, shall be subject to the preemption laws of fourth September, eighteen hundred and forty-one, with all the exceptions, conditions, and limitations therein, except as is herein otherwise provided; * * *"

Sec. 7. "* * * That where any settlement, by the erection of a dwelling-house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other land shall be selected in lieu thereof, agreeable to the provisions of the act of Congress approved on the twentieth of May, eighteen hundred and twenty-six, entitled "An act to appropriate lands for the support of schools in certain townships and fractional townships, not before provided for," and which shall be subject to approval by the Secretary of the Interior. And no person shall make a settlement or location upon any tract or parcel of land selected for a military post, or within one mile of such post, or on any other lands reserved by competent authority; nor shall any person obtain the benefits of this act by a settlement or location on mineral lands."

1857—Feb. 26; **Minnesota** (11 Stat. at L. 166):

Sec. 5. "* * * That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands, equivalent thereto and as contiguous as may be, shall be granted to said State for the use of schools."

1859—Feb. 14; **Oregon** (11 Stat. at L. 383):

Sec. 4. "* * * First, That sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools. * * *"

1861—Jan. 29; **Kansas** (12 Stat. at L. 126):

Sec. 3. (Identical to Sec. 5 of Minnesota Enabling Act.)

1864—Mar. 21; **Nevada** (13 Stat. at L. 30):

Sec. 7. (Identical to Sec. 5 of Minnesota Enabling Act.)

—Apr. 19; **Nebraska** (13 Stat. at L. 47):

Sec. 7. (Identical to Sec. 5 of Minnesota Enabling Act.)

1875—Mar. 3; **Colorado** (18 Stat. at L. Part 3, 474):

Sec. 7. (Identical to Sec. 5 of Minnesota Enabling Act.)

1877—Mar. 1; Note: Decision in *Heydenfeldt* v. *Daney Gold etc. Co.*, 93 U. S. 634.

1889—Feb. 22; **Washington, Montana, North Dakota, South Dakota.** Note: These four states came in under the Act of Feb. 22, 1889 (25 Stat. at L. 676).

Sec. 10. "That upon the admission of each of said states into the Union, sections numbered sixteen and

thirty-six in every township of said proposed states, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of congress, other lands equivalent thereto, in legal subdivision of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said states for the support of common schools, such indemnity lands to be selected within said states in such manner as the legislature may provide, with the approval of the Secretary of the Interior: * * *"

Sec. 11. "That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price of not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislature shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such land shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

1890—July 3; **Idaho** (26 Stat. at L. 215):

Sections 4 and 5. (Substantially the same as Sections 10 and 11 of Washington, et al., Enabling Act.)

—July 10; **Wyoming** (26 Stat. at L. 222):

Sec. 4. Note: This section identical to Section 4 of the Enabling Act of Idaho, except there is added the following:

"Provided, That Section 6 of the act of congress of August 9, 1888, entitled "an act to authorize the leasing of the school and university lands in the Territory of Wyoming, and for other purposes," shall apply to the school and university indemnity lands of the said state of Wyoming so far as applicable."

Sec. 5. (Identical to Section 5 of Idaho Enabling Act.)

APPENDIX III.

Legislative History Relating to the Origin in School Land Grants of the Provision: "Such Sections Shall Not Be Subject to Pre-emption or Entry, Whether Surveyed or Unsurveyed, But Shall Be Reserved for School Purposes Only."

The Enabling Act for the States of Washington, Montana, North Dakota and South Dakota was the first act to contain the provision "such sections shall not be subject to pre-emption or entry, whether surveyed or unsurveyed, but shall be reserved for school purposes only". This act originated in the Senate as S. 185. The legislative history relating to the bill is as follows:

Dec. 12, 1887:

Introduced in the Senate as "A bill to provide for the admission of the State of Dakota, into the Union, and for the organization of the Territory of Lincoln."

Referred to Committee on Territories. (50th Congress, 1st Session, page 33—Senate Journal.)

Jan. 23, 1888:

Reported back to the Senate by the Committee (Report No. 75), with amendment. (50th Congress, 1st Session, page 194—Senate Journal.)

In the amended bill of the Committee, as amended, Section 6 (Vol. 19, Part 3, page 2802, Cong. Record, 50th Congress, 1st Session) appeared as follows:

Sec. 6. "That sections 16 and 36 in every township of the public lands of the United States within said state, and where such sections, or any part thereof, shall be mineral lands, or shall have been sold or otherwise disposed of by the United States according to law, other lands equivalent thereto,

in legal subdivisions of not less than one-quarter section, are hereby granted to the said State for the support of common schools, and such sections shall not be subject to preemption or entry, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

Jan. 25, 1888:

The minority of the Committee on Territories submitted an amendment in which Section 10 (Vol. 19, Part 3, page 2832, Cong. Record, 50th Congress, 1st Session) appeared as follows:

Sec. 10. "That sections numbered 16 and 36 in every township in said proposed State of South Dakota, and where such sections or any subdivisions thereof, have been sold or otherwise disposed of, by or under authority of any Act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said proposed state for the support of common schools."

Apr. 19, 1888:

The amendment submitted by the Minority of the Committee on Territories (Section 10, *supra*), was rejected. (50th Congress, 1st Session, page 695—Journal.)

Apr. 19, 1888:

Amended bill of the Committee on Territories, as amended, was agreed to. The bill was then read the third time and passed. (50th Congress, 1st Session, page 696—Journal.)

Apr. 20, 1888:

S. 185 reported to the House. (50th Congress, 1st Session, page 1701—House Journal.)

Apr. 21, 1888:

Referred to Committee on Territories. (50th Congress, 1st Session, page 1708—House Journal.)

Jan. 15, 1889:

The bill came before the House for consideration and the Committee offered an amendment which struck out all the provisions after the Enacting clause, and this amendment became known as the "substitute bill", or "omnibus bill". The provisions relating to the school land grants were as follows:

Sec. 7. "That Sections numbered sixteen and thirty-six in every township of said proposed states, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said states for the support of common schools, * * *"

Sec. 12. "That all lands herein granted for educational purposes, except as hereinafter otherwise provided, shall be disposed of only at public sale, and at a price of not less than $10.00 per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in support of said schools. But said lands may, under such regulations as the Legislatures shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company. In all cases where actual settlers have located, resided upon, and made valuable improvements on section 16 or 36, prior to the first day of January, 1890, with the intention in good faith of purchasing such lands from the State upon its admission, the respective Legislatures may provide for disposing of so much of the lands so settled upon, to such settlers, their heirs, or legal representatives, at a price not less than $6.00 per acre, to be fixed by appraisement of the value of the lands exclusive of improvements. * * *"

(Vol. 20, Part 1, page 807, Cong. Record, 50th Congress, 2d Session.)

Jan. 17, 1889:

In the debate on the substitute bill, Mr. Macdonald of Minnesota made the following remarks with reference to Section 12:

"Being a Western Representative, I have two or three serious objections to raise to certain provisions contained in the substitute of the gentleman from Illinois. Section 12 of that substitute contains a provision which certainly ought not to be included in this Act. If gentlemen will refer to that section of the substitute they will find that it provides for the disposal of school lands to purchasers at a price not less than $10.00 per acre; but, in a provision beginning in line 9 of that section, the substitute provides that in all cases where settlers shall have located upon such school lands prior to the 1st day of January, 1890, with the intention in good faith, of purchasing the lands, they can procure them at $6.00 per acre. Now, I do not believe there is a Western gentleman here or others who have had such experience as we have had—indeed it does not require that a man should have had any experience in the West for him to know, in view of the weaknesses of human nature, that, before January, 1890, with that clause in this act, there would not be a valuable school section in either North or South Dakota that would not be 'settled upon' and taken at $6.00 per acre, by parties who would go and locate upon them between now and that date." (Vol. 20, Part 1, page 900, Cong. Record, 50th Congress, 2d Session.)

Following the foregoing remarks of Macdonald, Section 12 was amended by striking the words: "1st day of January, 1890", and there was inserted in lieu thereof the following:

"survey of said section or the passage of this act." (Vol. 20, Part 2, page 946, Cong. Record, 50th Congress, 2d Session.)

Section 7 was also amended by adding thereto the following:

"Provided, that the rights of all settlers on un-

surveyed lands under the general land laws, upon lands found upon survey to be within sixteenth or thirty-sixth sections, where their settlements were made before survey, or the approval of this act, shall be preserved, and where payment shall be required it shall be at the rate of $1.25 per acre." (Vol. 20, Part 2, page 948, Cong. Record, 50th Congress, 2d Session.)

Jan. 18, 1889:

S. 185 as amended by the substitute bill, and the amendments to the substitute bill, was passed by the House. (50th Congress, 2d Session, page 951—Vol. 20, Part 1, Cong. Record.)

Jan. 19, 1889:

S. 185 returned to Senate and referred to Committee on Territories. (50th Congress, 2d Session, Part 1, page 991—Vol. 20, Cong. Record.)

Feb. 1, 1889:

Reported back to Senate from the Committee on Territories with the recommendation that the House amendment be not concurred in, and asking for conference. Conferees were appointed consisting of Platt, Cullom and Butler. (50th Congress, 2d Session, Part 2, page 1390, Vol. 20, Cong. Record.)

Feb. 2, 1889:

The non-concurrence of the Senate to S. 185 reported to the House and the following conferees were appointed: Springer, Barnes and Baker. (50th Congress, 2d Session, Part 2, page 1426—Vol. 20, Cong. Record.)

Feb. 20, 1889:

The Conference Committee reported back to the Senate upon the bill, agreed upon by the Committee. Such bill contained the following provisions:

Sec. 10. "That upon the admission of each of said states into the Union, sections numbered 16 and 36 in every township of said proposed states,

and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter-section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the Legislature may provide, with the approval of the Secretary of the Interior: * * *"

Sec. 11. "That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the Legislatures shall prescribe, be leased for periods of not more than five years, in quantities not exceeding 1 section to any one person or company; and such land shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

(Vol. 20, Part 3, pp. 2095-2096, Cong. Record, 50th Congress, 2d Session.)

Conference Committee report adopted by Senate. (Vol. 20, Part 3, page 2104, Cong. Record, 50th Congress, 2d Session.)

Feb. 20, 1889:

The House Conferees reported the agreed bill back to the House. (Vol. 20, Part 3, page 2113, Cong. Record, 50th Congress, 2d Session.)

A statement prepared by the House Conferees explaining the agreed bill was read to the House, and such statement contained the following:

"The provisions in regard to the public lands are retained substantially as passed by the House,

with the exception that the proviso in regard to the settlement of the sixteenth and thirty-sixth sections of unsurveyed lands is stricken out, and it is provided that such lands shall not be subject to preemption, homestead entry, or any other entry under the laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only." (Vol. 20, Part 3, page 2116, Cong. Record, 50th Congress, 2d Session.)

Conference Committee report adopted by House. (Vol. 20, Part 3, page 2116, Cong. Record, 50th Congress, 2d Session.)

Also, in connection with this act, there were numerous bills in previous sessions dealing with the admission of these states.

In the 49th Congress, 1st Session, for example, S. 967 relating to the admission of the State of Dakota and the organization of the Territory of Lincoln, was introduced and acted upon. (Pages 153 and 254—Senate Journal.)

In the same Congress, same Session, S. 67, relating to the admission of the State of Washington, was introduced and acted upon. (Vol. 17, Part 1, page 123, Cong. Record, 49th Congress, 1st Session.)

When the Senate was considering S. 67, Harrison of Indiana, in regard to land grants to the states, stated as follows:

> "I may say to the Senate that nearly the entire vacation of the Senate during the holidays was spent by me in carefully examining the precedents as to land grants and courts in the case of Dakota, and the bill as originally introduced was crowded on every page of it with amendments that were made as a result of my observation and study. It is a subject that requires care." (Vol. 17, Part 3, page 3257, Cong. Record, 49th Congress, 1st Session.)

APPENDIX IV.

The Coleman Survey.

Letter of March 7, 1892:

The State of Wyoming, by letter dated March 7, 1892, made the following request of the United States:

> "The State Board of Control is charged with the duty of selecting the lands donated by the United States Government to the State of Wyoming, at the time of its admission. In order that these selections may be made without delay the Board requests that you cause to be surveyed and subdivided as speedily as possible, the following named townships, to-wit: * * * Township 58 North, Range 100 West * * *." (R. 188.)

Coleman Contract No. 247, March 8, 1892:

Pursuant to such request, contract No. 247 was entered into by the United States with one Augustus L. Coleman on March 8, 1892. Under said contract Coleman was bound to survey, amongst others, Township 58 North, Range 100 West, embracing the Section 36 in controversy:

> "* * * in strict conformity with the laws of the United States, the printed Manual of Surveying Instructions, and other surveying instructions issued by the Commissioner of the General Land Office, and with such special instructions as he may receive from the said Surveyor General in conformity therewith (all of said instructions to be taken and deemed a part of this contract), will well, truly, and faithfully survey, mark, and establish * * * the exterior and subdivisional lines of townships 57 north, ranges 97, 98, 99, 100, 101 and 102 west, and of fractional townships 58 north, ranges 97, 98, 99, 100, 101 and 102 west of the

6th Principal Meridian, Wyoming, and that he will complete these surveys, in the manner aforesaid, * * *."

"And the said Surveyor General, in his official capacity aforesaid, covenants and agrees with the said Augustus L. Coleman that on the completion of the surveys above named, in the manner aforesaid, there shall be paid to the said Augustus L. Coleman by the Treasury Department of the United States, as a full compensation for all work performed under this agreement, * * * for every mile actually run and marked in the field, * * *; Provided, however, that no payment shall be made until the plats and field notes of the surveys executed under this contract shall have been accepted by the Commissioner of the General Land Office."

"It is further agreed by and between the parties to this agreement that no accounts shall be paid unless properly certified by the said Surveyor General (or his successor in office) that the surveys are in accordance with the instructions herein referred to and the provisions of this agreement, and until approved plats and certified transcripts of field-notes of the surveys for which the accounts are rendered are filed in the General Land Office."

"And it is further understood and agreed * * * that the said surveys will not be approved by the said Surveyor General * * * unless they shall be found to be in exact accordance with the instructions hereinbefore specified: * * *." (R. 188B.)

Special Instructions, March 11, 1892:

As a part of said contract and attached thereto are special instructions dated March 11, 1892, which state in part that:

"The following special instructions are supplemental to the Manual dated January 1, 1891,[1] and with the

1. This reference is to Manual of Instructions of January 1, 1890; see statement of counsel at page 85 of Record.

Manual form a part of your contract No. 247, dated March 8, 1892, and are issued for your governance in matters pertaining to the surveys embraced in said contract, and which are not provided for in the printed manual."

"* * * You will survey and establish the north boundary of township 57 N., Rg. 100 west by running west on a random line from the corner of townships 57 and 58 N., Rgs. 99 and 100 west to the 12th Auxiliary Meridian West, setting temporary corners at each 40 and 80 chains, and return thence on a true line permanently establishing the temporary corners in their proper places.

"The survey of the lands embraced in your contract has been requested by the State Board of Control, a Board authorized by the Legislature to select the lands donated to the State by the General Government, and in view of the fact that it will be impossible, in advance of the surveys, to designate the lands which the Board of Control will select for State purposes, you are instructed to subdivide in full every township containing lands valuable for any purpose and upon which you enter for subdivisional work. Utter impracticability on account of rugged character of the land, or exhaustion of the appropriation, will be the only valid excuse for leaving unsurveyed section lines in any township upon which you have entered for subdivisional work." (R. 190.)

Letter to Commissioner of General Land Office, April 11, 1892:

The said contract and special instructions were forwarded to the Commissioner of the General Land Office by the Surveyor General with letter of April 11, 1892, in which it is stated:

"* * * I inclose letter from the State Board of Control asking for the survey of the townships embraced in this contract on the ground that the State desires to make selections of land within said tract." (R. 187.)

Commissioner Approves Coleman Contract April 28, 1892:

Said Contract No. 247, of March 8, 1892, was approved by the Commissioner of the General Land Office on April 28, 1892. (R. 188A.)

Coleman Survey Examined by Surveyor General:

On August 5, 1892, the Surveyor General requested permission to make a field examination of the surveys executed under said Contract No. 247. (R. 193.)

On August 11, 1892, the Commissioner of the General Land Office authorized the Surveyor General "* * * to make a personal inspection of the surveys executed under the contracts above referred to." (R. 195.)

Completion of Coleman Survey:

The letter of November 26, 1892, from the Surveyor General to the Commissioner of the General Land Office, and the plats therein referred to are of particular significance. Such letter is as follows:

"I forward herewith, in separate packages, for your approval, the plats and transcripts of field notes of surveys executed by Augustus L. Coleman, U. S. Deputy Surveyor, under his contract No. 247, dated, March 8, 1892. The returns of this survey embrace the following lines and transcripts, viz:

1 plat of exterior lines and eleven plats of subdivisional lines, in all 12 plats.
1 transcript of the 14th Standard Parallel.
1 transcript of the 12th Guide and 12th Auxiliary Meridians.
2 transcripts of the exterior lines.
11 transcripts of subdivisional lines.

15 transcripts in all.

"This contract and the special instructions thereunder were approved by you in your letter 'E', dated April 28, 1892.

"I also inclose the transcript of field notes of examination of the above surveys made by myself under authority contained in your letter 'E' dated Aug. 11, 1892." (R. 196.)

Coleman Survey Accepted December 20, 1892:

The Coleman Surveys, plats and field notes and the field examination thereof by the Surveyor General, transmitted to the Commissioner of the General Land Office by the Surveyor General with his letter of November 26, 1892, were found satisfactory and were accepted by the Commissioner of the General Land Office on December 20, 1892, as follows:

"* * * Said surveys are considered satisfactory, and are hereby accepted, * * *" (R. 235.)

Moreover, on January 5, 1893, the Commissioner certified that the sum of $3,757.17

"* * * is due from the United States unto the said Augustus L. Coleman for surveying done by him in Wyoming under contract of March 8, 1892, No. 247, for his account therefor, as certified on the 26th day of Nov. 1892, by Wm. A. Richards, Surveyor-General of Wyoming, which has been compared by this office with the approved plat of the surveys thus executed and found correct; * * *" (R. 235.)

Corners and Boundaries Established by Coleman.

Common Corner to Townhips 57 and 58 North, Ranges 99 and 100 West:

On June 6, 1892, Coleman

"Set a sandstone 18x14x13 ins. 12 ins. in the ground for cor. to Tps. 57 and 58 N., Rs. 99 and 100 W., marked T. 58 on N. E., R. 99 on S. E. T. 57 on S. W. and R. 100 on N. W. faces with 6 notches on each edge, dug pits 24x18x12 ins., lengthwise on each line, N. S. E. and W. of stone 6 ft. dist. and raised a mound of earth, 2½ ft. high, 5 ft. base alongside." (R. 201.)

In accordance with his instructions, Coleman ran west from the Southeast Corner of T. 58 N., R. 100 W. on a random line (the S. boundary of T. 58 N., R. 100 W. being also the N. boundary of T. 57 N., R. 100 W.) to the Southwest corner of T. 58 N., R. 100 W., setting temporary corners at each 40 and 80 chains and then, after making proper corrections, returned on the true line measuring the boundaries, setting stone markers thereon at each half mile and at each mile (at each 40 and 80 chains) thereby establishing permanent Corners on the South boundary of T. 58 N., R. 100 W.

Southwest Corner Township 58 North, Range 100 West and South Boundary of Township 58 North, Range 100 West:

"From the Tp. cor. to Tps. 57 and 58 N., Rs. 99 and 100 W., established by me, I run west on a random line bet. said Tps., the variation of my compass being 18° 30′ E. I set temporary half mile and mile corners at each 40 and 80 chs. and find the township line to be 6 miles and 2 chs. long and the falling to be 53 lks. N. of cor. to Tps. 57 and 58 N., Rs. 100 and 101 W., on the 12th Auxiliary Meridian W.

"The correction for the true line will therefore be 8.8 lks. N. per mile and its course will be N. 89° 56′ E." (R. 202.)

Mr. Coleman's field notes and plats show that on June 7, 1892, he measured the South boundary of T. 58 N., R. 100 W., set, marked and permanently established corners thereon at each half mile (R. 201-203) including corners intended for the Southwest Corner and South Quarter corner of Section 36 therein.

Southeast Corner, Section 35, Southwest Corner Section 36, T. 58 N., R. 100 W.—Northeast Corner Section 2 and Northwest Corner Section 1, T. 57 N., R. 100 W.:

Proceeding east on the true South boundary of T. 58 N., R. 100 W., 80 chains from the Southwest corner intended for Section 35 therein, Coleman on June 7, 1892:

"80.00 (chains) Set a sandstone 12x8x5 ins., 8 ins.,

in the ground for cor. to secs. 1, 2, 35 and 36, marked with 1 notch on E. and 5 notches on the W. edges and raised a mound of stone, 1½ ft. high, 2 ft. base, alongside.

Pits impracticable.
Land, mountainous 80 chs.
Soil, 4th rate." (R. 203.)

South Quarter Corner Section 36, T. 58 N., R. 100 W.:

(Continuing east on South boundary of T. 58 N., R. 100 W. from corner next above described.)

June 7, 1892.

"N. 89° 56′ E., on a true line bet. secs. 1 and 36.
Va. 18° 30′ E.

Over rough, mountainous land ascending.

21.00 (chains) Enter scattering scrub pine and cedar timber and descend.

32.00 (chains) Small stream, 4 lks. wide, course N. 60° E. Ascend.

"40.00 (chains) Set a sandstone 14x10x5 ins., 9 ins. in the ground for ¼ sec. cor. marked ¼ on N. face; dug pits 18x18x12 ins., E. and W. of stone, 5½ ft. dist. and raised a mound of earth, 1½ ft. high, 3½ ft. base, alongside." (R. 203.)

Coleman then established the remaining ½ mile of true South boundary returning to the Southeast corner of T. 58 N., R. 100 W., described in his notes as "The cor. to Tps. 57 and 58 N., Rs. 99 and 100 W."

"80.00 (chains) The cor. to Tps. 57 and 58 N., Rs. 99 and 100 W. Land, mountainous, 80 chs. Soil 4th rate. Timber, scrub pine and cedar." (R. 203.)

East Quarter Corner Section 36, T. 58 N., R. 100 W.:

(Continuing North with Coleman from Southeast Corner, T. 58 N., R. 100 W.)

"Survey commenced June 10, 1892.

From an observation on Polaris at eastern elongation at the cor. to Tps. 57 and 58 N., Rs. 99 and 100 W.,

and find the true meridian so determined has at 8 A. M., June 10 a magnetic bearing of 18° 35′ W. which corrected by table, page 55 manual gives mean declination of N. 18° 30′ E.

From the Twp. cor. to Tps. 57 and 58 N., Rs. 99 and 100 W., recently established by me, I run North bet. secs. 31 and 36.

Va. 18° 30′ E.

Over rolling land.

21 (chains) Silver Tip gulch, course N. W.

Ascend over rough mountainous land.

32.35 (chains) Perpendicular cliff 30 ft. high.

40.00 (chains) Set a sandstone 24 x 18 x 2 ins., 18 ins., in the ground for ¼ sec. cor., marked ¼ on W. face and raised a mound of stone 1½ ft. high, 2 ft. base, alongside. Pits impracticable." (R. 208)

Northeast Corner Section 36 and Southeast Corner Section 25, T. 58 N., R. 100 W.—Northwest Corner Section 31 and Southwest Corner Section 30, T. 58 N., R. 99 W.

(Continuing North from East Quarter Corner next above described.)

June 10, 1892.

"66.00 (chains) Top of spur, bears E. and W.

Descend.

80.00 (chains) Set a sandstone 14 x 8 x 6 ins., 9 ins. in the ground for cor. to secs. 25, 30, 31 and 36, marked with 5 notches on N. and 1 notch on S. edges; dug pits 18 x 18 x 12 ins. in each sec. 5½ ft. dist. and raised a mound of earth 2 ft. high, 4½ ft. base, alongside. Land mountainous 59 chs.

rolling 21 chs.

Soil, rocky, 4th rate.

Timber, scrub pine."

"50.00 (chains) Ascend steep slope of mountain.

70.46 (chains) Intersect N. boundary of Wyoming.

16.74 (chains) W. of 109th mile post, which is a pine post 5 ins. sq. by 5 ft. above ground marked Mont. on N., Wyo. on S. 45° N. L. 1880 on E. and 109 M. on W.

faces. Set a sandstone 20 x 8 x 2 ins. 15 ins. in the ground for closing cor. to fractional Tps. 58 N., Rs. 99 and 100 W., marked C. C. T. 58 on S., R. 99 on E. and R. 100 on W. faces with 3 grooves on S. and 6 grooves on E. and W. faces; dug pits 24 x 18 x 12 ins., S., E. and W. of stone, crosswise on each line, 6 ft. dist. and raised a mound of earth, 2½ ft. high, 5 ft. base, alongside.
Land, mountainous 20.46 chs.
rolling 50 chs.
Soil 2d and 4th rate."
(R. 208, 209.)

This point ties into the 109th mile post on the boundary of Wyoming, established by Reeves August 19, 1880 (R. 209).

APPENDIX V.

Organic Act for Wyoming of July 25, 1868, c. 235, 15 Stat. 178, Sec. 14:

> "That sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby reserved for the purpose of being applied to public schools in the state or states hereafter to be erected out of the same."

Enabling Act of Wyoming of July 10, 1890, c. 664, Secs. 4 and 5, 26 Stat. 222:

> "SEC. 4. That sections numbered sixteen and thirty-six in every township of said proposed State, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided,* That section six of the Act of Congress of August ninth, eighteen hundred and eighty-eight, entitled 'An Act to authorize the leasing of the school and university lands in the Territory of Wyoming, and for other purposes,' shall apply to the school and university indemnity lands of the said State of Wyoming so far as applicable.
>
> "SEC. 5. That all lands herein granted for educational purposes shall be disposed of only at public sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under

such regulations as the legislature shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such land shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."